

## TWO WRONGS DON'T MAKE A FOURTH AMENDMENT RIGHT: *SAMSON*<sup>1</sup> COURT ERRS IN CHOOSING PROPER ANALYTICAL FRAMEWORK, ERRS IN RESULT, PAROLEES LOSE FOURTH AMENDMENT PROTECTION

### I. INTRODUCTION

In Arkansas, police may search a parolee's computer without cause for evidence of legal, but pornographic, material.<sup>2</sup> Scholars cry out, "The Fourth Amendment today is an embarrassment,"<sup>3</sup> as the Supreme Court continues to chill Fourth Amendment rights unreasonably by subjecting classes of the population to search at any time without cause.<sup>4</sup>

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1. *Samson v. California*, 547 U.S. 843 (2006).

2. Charlie Frago, *Computers Parole Tools in Sex Cases, Officers Told*, ARK. DEMOCRAT-GAZETTE, Nov. 7, 2006. Arkansas argues that parolee searches such as these are justified, in particular for sex offenders, as "the images, words and video inside a sex offenders' [sic] computer can be a blueprint of hidden desires." *Id.* Officials claim that finding pornographic material before a crime is committed can help to avert risk of future offenses. *Id.* Policies of random computer searches are based on research indicating that viewing pornographic materials will increase the likelihood of sex offenders reoffending, a proposition that is fiercely debated. *Id.* While random searches of parolees are justified using the *Samson* decision, courts rely further on the consent rationale as many sex offenders in Arkansas have a parole condition that restricts them from viewing pornography – locating pornography on their computer can be enough to send them back to prison. *Id.* Some wish to push the limits of *Samson*. *Id.* One official remarked, "[f]or the computer searches to be effective, states need to attach limits on Internet use as part of a parolee's supervisory plan," and further recommending that "Internet chat rooms, Webbased e-mail accounts that can be accessed from any computer, detachable disk drives and USB devices should all be off limits to sex offenders." *Id.*

3. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994). Amar further exemplifies many people's frustrations with Fourth Amendment jurisprudence, remarking:

Warrants are not required – unless they are. All searches and seizures must be grounded in probable cause – but not on Tuesdays. . . . Meanwhile, sensible rules that the Amendment clearly does lay down or presuppose – that all searches and seizures must be reasonable, that warrants (and only warrants) always require probable cause, and that the officialdom should be held liable for unreasonable searches and seizures – are ignored by the Justices. Sometimes . . . [i]f there are good reasons for these and countless other odd results, the Court has not provided them.

*Id.* at 757-58.

4. See Posting of Dan Filler to Concurring Opinions Blog, *Parole After Samson*, [http://www.concurringopinions.com/archives/2006/06/parole\\_after\\_sa.html](http://www.concurringopinions.com/archives/2006/06/parole_after_sa.html) (June 20, 2006) ("DA's

*Samson v. California* stands in contrast to many years of Fourth Amendment jurisprudence – from the Framers’ adoption of the Fourth Amendment as a safeguard against the arbitrary and intrusive searches supported by general warrants to modern case law explaining that warrantless searches are per se unreasonable.<sup>5</sup> *Samson* serves as the most recent example of the Supreme Court’s erosion of citizens’ Fourth Amendment protections.<sup>6</sup>

The *Samson* Court reached an inappropriate decision by ignoring the importance of Fourth Amendment rights – even for parolees – and overestimating the state’s interests.<sup>7</sup> Both the consent doctrine and the special needs doctrine fail to provide adequate justification for

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will rarely lose a Fourth Amendment suppression motion submitted by a parolee. Other than states with a special interest in parolee privacy - and I have yet to meet that state - I would expect most jurisdictions to encourage officers to conduct these suspicionless searches.”). People feel differently about preserving Fourth Amendment rights for parolees than they do for innocents, feeling that Fourth Amendment rights are not completely independent of what a person does with them. Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1459 (1996). People begin with a right to privacy; some lose part of this right by virtue of their actions. *Id.* This theory captures the popular sentiment that guilty persons do not deserve a right to conceal evidence of their criminality. *Id.* The notion is that “the fourth amendment exists to protect the innocent and may normally be invoked by the guilty only when necessary to protect the innocent” so that “if a device could be invented that accurately detected weapons and did not disrupt the normal movement of people, there could be no fourth amendment objection to its use.” Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246, 1248 (1983).

5. See *infra* Part II.A-B and note 15 (discussing general warrants). Modern interpretation of the Fourth Amendment is not without its contradictions. “Put simply, the single sentence that constitutes the Fourth Amendment . . . has resulted in billions of words of interpretive text by the Supreme Court, state and lower federal courts, and commentators.” JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE* 76 (Lexis 3d ed. 2002). Indeed, current interpretation of the Fourth Amendment is a “mass of contradictions and obscurities.” Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985). Others argue, “although the Supreme Court purports to rely on a consistent method of constitutional analysis when rendering decisions on Fourth Amendment issues, the case law in this area indicates that the Court is influenced sometimes by the citizen’s perspective, sometimes by the police officer’s perspective, and sometimes by the perspective of the hypothesized reasonable person.” Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. AND MARY BILL OF RTS. J. 677, 677 (1998). Through the years, the Court has increasingly moved toward viewing cases “solely from the police officers’ perception of the reasonableness of their actions and thus . . . has weakened the protections of citizens’ Fourth Amendment rights.” *Id.* The Supreme Court’s current decisions hang on one proposition, that government officers “have free rein to search whomever they choose, whenever they choose, for whatever reason they choose.” *American Civil Liberties Union Urges Supreme Court to Reaffirm Legal Limits of Police Search, Seizure Powers*, U.S. FED. NEWS, Feb. 22, 2006 [hereinafter *A.C.L.U.*].

6. David T. Reindl, *Bargains or Unconstitutional Contracts? How Enforcement of Probation Orders as Contracts Could Take the Reasonableness Out of Probation Searches*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 123, 135 (2007).

7. See *infra* Part IV.A. “The bottom line is that government cannot cut constitutional corners even in pursuit of a goal it identifies as being for the public good.” *A.C.L.U.*, *supra* note 5.

suspicionless searches of parolees.<sup>8</sup> This shift in Fourth Amendment interpretation produces unreasonable and unwarranted results.<sup>9</sup>

This Note will follow the Fourth Amendment from its origins to its modern application to parolee rights, as evidenced by the *Samson* Court. Part II focuses on the Fourth Amendment, from the circumstances surrounding its adoption to modern court cases that have applied its tenets to prisoners, probationers, and, finally, parolees.<sup>10</sup> Part III details the Supreme Court's decision in *Samson v. California*, including a thorough discussion of the facts that gave rise to the case and lower court decisions.<sup>11</sup> Part IV explores the problems with the Court's framework and suggests other possible frameworks the Court could have used to come to a decision in *Samson*, while also exploring the ramifications of each analytical framework.<sup>12</sup>

## II. BACKGROUND

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>13</sup>

### A. History of the Fourth Amendment

The historical context surrounding the Framers' inclusion of the Fourth Amendment in the Bill of Rights is imperative to a proper interpretation and application of the Amendment.<sup>14</sup> Prior to the

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8. See *infra* Part IV.B-C.

9. See Filler, *supra* note 4 (explaining that “the dissent correctly views the decision as a doctrinal shift, but it is only one more step in a longstanding move towards a ‘common sense’ (i.e., defendant unfriendly) approach to criminal justice”).

10. See *infra* Part II and accompanying notes (discussing the background of the Fourth Amendment, as well as documenting the slow termination of parolees' rights).

11. See *infra* Part III and accompanying notes (setting forth a summary of the majority and dissenting opinions of the *Samson* court).

12. See *infra* Part IV and accompanying notes (analyzing the method the Court used to arrive at their decision as well as other methods they could have employed).

13. U.S. CONST. amend. IV. The Fourth Amendment was applied to the states through the Due Process Clause in *Mapp v. Ohio* as the “security of one’s privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in the ‘concept of ordered liberty.’” Reindl, *supra* note 6, at 126-27; see also *Mapp v. Ohio*, 367 U.S. 643 (1961).

14. See generally *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 532 (1967) (looking to the “purposes behind the warrant machinery contemplated by the Fourth Amendment”). The

American Revolution, the colonies issued general warrants and “writs of assistance,”<sup>15</sup> which effectively placed “the liberty of every man in the hands of every petty officer.”<sup>16</sup> Though British control had ended, the Framers had the struggle for liberty and history of abuse “fresh in the[ir] memories” when they adopted the Fourth Amendment and intended to prevent these types of abuses from reoccurring.<sup>17</sup>

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Court found further, a “governing principle, justified by history and by current experience, [that] has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is ‘unreasonable’ unless it has been authorized by a valid search warrant.” *Id.* at 528-29; *see also infra* note 15. Historical scholars have published numerous commentaries on the Fourth Amendment that have “either favored or rejected a warrant requirement. However, none have supported their answer with persuasive historical evidence.” Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH L. REV. 547, 551(1999). The Fourth Amendment was drafted amidst concerns “almost exclusively about the need to ban house searches under general warrants.” *Id.* The idea of a warrantless search was foreign to the Framers; indeed, they “expected that warrants would be used.” *Id.* at 552. “[H]eighted concerns about crime and disorder” created a movement toward giving police officers more power in the nineteenth century. *Id.* By the early twentieth century, the Supreme Court had caught up with this movement and responded to the new threats to individuals’ privacy rights by extending the Fourth Amendment to cover searches without warrants. *Id.*

15. *Boyd v. United States*, 116 U.S. 616, 625 (1886). A writ of assistance, “[i]n colonial America,” was defined as “a writ issued by a superior colonial court authorizing an officer of the Crown to enter and search any premises suspected of containing contraband.” BLACKS LAW DICTIONARY (8th ed. 2004). “The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods.” *Boyd*, 116 U.S. at 625. “As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution.” *Id.* at 626-27.

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

*Id.* at 635.

16. *Boyd*, 116 U.S. at 625; *see supra* note 15. Attorney James Otis described writs of assistance as the “worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book,” in a February 1761 debate in Boston to rally support for colonial resistance to Britain. *Boyd*, 116 U.S. at 625; *United States v. Stewart*, 468 F. Supp. 2d 261, 262 (D. Mass. 2007). John Adams, speaking on James Otis’s remarks, declared, “[T]hen and there was the first scene of the first act of oppression to the arbitrary claims of Great Britain. Then and there the child Independence was born.” *Boyd*, 116 U.S. at 625; *see also* *Payton v. New York*, 445 U.S. 573, 583 (1980) (“It is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”).

17. *Boyd*, 116 U.S. at 625; *see supra* note 15.

### B. Interpretation of the Fourth Amendment

The Supreme Court has traditionally interpreted the Fourth Amendment “right against unreasonable searches” as requiring probable cause for searches and seizures.<sup>18</sup> Searches conducted outside the

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18. See *Katz v. United States*, 389 U.S. 347 (1967) (holding that a search was not reasonable because officers did not have their actions scrutinized by a neutral magistrate for probable cause, thereby implicitly defining the reasonableness prong of the Fourth Amendment in terms of the warrant clause). The Fourth Amendment has two clauses:

The first portion of the Fourth Amendment tells us what the amendment seeks to prohibit (or, if you will, what right we hold against the government). In this portion, the text states *who* is covered (“the people”); *what* is covered (“persons, houses, papers, and effects”); and the nature of the protection (“to be secure . . . against unreasonable searches and seizures”). This portion of the Fourth Amendment, in particular the latter language, is sometimes described as the “Reasonableness Clause” (or “reasonableness requirement”) of the Fourth Amendment. The second portion of the Fourth Amendment relates to warrants. It tells us what is required for a warrant to be issued (“probable cause [for the search or seizure], supported by oath or affirmation”), and tells us something about the form of the warrant itself (“particularly describing the place to be searched, and the persons or things to be seized”). This portion of the text is often described as the “Warrant Clause”, with its “particularity requirement.”

DRESSLER, *supra* note 5, at 77 (alteration in original). One of the longest debates in Fourth Amendment jurisprudence surrounds the issue of what connection there should be between the reasonableness requirement and the Warrant Clause. *Id.* “For most of the Fourth Amendment’s history, the Supreme Court read the two phrases together, interpreting the vague term ‘unreasonable’ as modified by the requirements of the ‘warrant clause.’” *Stewart*, 468 F. Supp. 2d at 265. Under this “unitary” approach, a reasonable search or seizure would necessarily be supported by probable cause and be executed pursuant to a valid warrant. *Id.* at 266. See generally *Camara*, 387 U.S. at 533 (questioning “whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,” making necessary the implication that search requirements are typically construed in light of the warrant requirement). Critics of the unitary approach maintain that as the probable cause requirement is found only in the Warrant Clause, probable cause is only necessary in cases in which an officer has applied for a warrant. See William S. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899-89 (1991). As to warrantless searches and seizures, the text of the Fourth Amendment tells us only that the activity be reasonable. Amar, *supra* note 3, at 785. Some scholars claim that the warrant requirement is unnecessary because of the impracticability of the warrant requirement actually protecting citizens’ rights. Indeed,

[h]ow can a magistrate be more than a ‘rubber stamp’ in signing warrants unless he devotes at least some minutes in each case to reading the affidavits submitted to him in support of the request for a warrant, and inquiring into the background of the conclusions stated therein? And where is the judicial time going to be found to make such inquiries in the generality of cases?

Edward L. Barrett, Jr., *Criminal Justice: The Problem of Mass Production*, in THE AMERICAN ASSEMBLY: THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 85, 117 (Harry W. Jones ed. 1965). Others still find reason to impose a warrant requirement in that it requires police officers to show that they had probable cause prior to arrests and searches, to serve as a check on officers, ensuring that they do not make up probable cause after the fact. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 214-15 (1966). But, the warrant requirement does not prevent illegal searches. Stuntz, *supra*, at 893.

Police officers are not the only ones who can get the relevant legal standards wrong;

prescribed limits of the Fourth Amendment are per se unreasonable, “subject only to a few specifically established and well delineated exceptions.”<sup>19</sup> All searches and seizures are measured against the reasonableness standard of the Fourth Amendment, but the Supreme Court has continually explained and clarified what is and is not reasonable.<sup>20</sup>

### 1. The Reasonableness Requirement

In recent years, the Supreme Court has generally applied a more

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other actors in the system make mistakes as well. And while requiring warrants does reduce the odds of police mistake in applying the relevant legal standards, it also creates additional opportunities for error by magistrates. This is no small problem. Magistrates (1) may do a bad job of applying the probable cause standard because of deficiencies in the warrant process (review is ex parte and cursory), and (2) nevertheless receive a great deal of deference by judges after the fact. Requiring warrants therefore may lead to many *more* bad searches than would a simple system of police decisionmaking followed by after-the-fact review.

*Id.* at 893 (emphasis added).

19. *Katz*, 389 U.S. at 357. Exceptions to the warrant requirement should be “jealously and carefully drawn.” *Jones v. United States*, 357 U.S. 493, 498 (1958). *See also* *State v. Moore*, 853 A.2d 903, 906 (N.J. 2004) (listing multiple exceptions to the warrant requirement). The purpose of the Fourth Amendment, to shield citizens from unwarranted privacy intrusions, would be empty and without effect if exceptions were given freely. *Katz*, 389 U.S. at 357; *but see* *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (finding that the warrant preference model is a judicial creation that is not implicit in the nature of the Fourth Amendment, as there is nothing in the Fourth Amendment that requires warrants to be obtained prior to searches). Modern cases still support the proposition that the judiciary has a preference for the warrant model. *See* *State v. O’Hagen*, 914 A.2d 267, 272 (N.J. 2007).

20. *See infra* Part II.B.1-2. The Court has done so by setting forth factors that should weigh heavily in favor of allowing warrantless searches or by naming general categories of exceptions to the warrant requirement. *See, e.g.,* *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001) (finding that the common law practice of requiring warrants to arrest for misdemeanor traffic violations was “obviously relevant, if not entirely dispositive,” as to the Framers’ definition of reasonableness); *Segura v. United States*, 468 U.S. 796, 798 (1984) (“[W]here officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, [19 hours], secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment’s proscription against unreasonable seizures.”); *Illinois v. Rodriguez*, 497 U.S. 177, 183-84 (1990) (noting “there are various elements, of course, that can make a search of a person’s house ‘reasonable’ – one of which is the consent of the person or his cotenant”). What the courts determine as reasonable today differs significantly from historical trends. Reindl, *supra* note 6, at 129. Around twenty years ago, scholars and courts supported a probable cause standard for searches of parolees. *Id.* “Today, of course, such an argument would hardly be persuasive, given the substantial quantity of recent, unsupportive case law.” *Id.*

flexible approach to Fourth Amendment jurisprudence.<sup>21</sup> The Court emphasizes, “The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials.”<sup>22</sup> Courts judge reasonableness by assessing the totality of the circumstances and employing a balancing test that weighs governmental interests against an individual’s privacy interest.<sup>23</sup> In most criminal cases, this balance is struck in favor of the warrant procedures outlined in the Fourth Amendment.<sup>24</sup>

## 2. The Consent Exception

Warrantless searches do not violate the Fourth Amendment if they are conducted pursuant to consent of the person being searched, so long as the consent is freely and voluntarily given.<sup>25</sup> Generally, the courts

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21. *Stewart*, 468 F. Supp. 2d at 266 (remarking that in recent years the Supreme Court “has abandoned [the unitary] approach and bifurcated the Fourth Amendment, focusing on the reasonableness clause exclusively, relatively unaffected by the requirements of the warrant clause”).

22. *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (holding that stopping and detaining an automobile without some suspicion is unreasonable according to the Fourth Amendment). Reasonableness is the cornerstone of Fourth Amendment jurisprudence. Reindl, *supra* note 6, at 169. Whether reasonableness is assured by means of requiring reasonable suspicion or probable cause, prohibiting arbitrary, capricious, or harassing searches, or looking to the intent of law enforcement officials, “reasonableness is clearly an indispensable constitutional guarantee that should be implied in every probation agreement.” *Id.*

23. *Id.* at 654; *see also Samson v. California*, 547 U.S. 843, 848 (2006). Reasonableness depends on the nature of the search, including all of the circumstances surrounding the search. *Prouse*, 440 U.S. at 654.

24. *United States v. Place*, 462 U.S. 696, 701 (1983) (declaring that a search conducted without a warrant is per se unreasonable); *see also Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (remarking the “point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences. . . . Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate . . .”). “[T]he essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy.” *Payton v. New York*, 445 U.S. 573, 588 n.26 (1980). The Fourth Amendment further serves as a check on the powers of the executive. Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 371 (1973-1974). Courts, in enforcing the Fourth Amendment, “police the police.” *Id.*

25. Michael Keasler, *Criminal Procedure: Confessions, Searches, and Seizures*, 59 SMU L. REV. 1167, 1176 (2006). Consent of the person being searched does not refer only to the searching of one’s person, but extends to one giving consent for officers to search his home, car, or other personal effects. 68 AM. JUR. 2D *Searches and Seizures* § 135 (2006). Further, the person giving consent need only have actual or apparent authority over the item being searched. *See e.g. Georgia v. Randolph*, 547 U.S. 103, 110 (2006) (explaining that “the common authority that counts under the Fourth Amendment may be broader than the rights accorded by property law”).

The constant element in assessing Fourth Amendment reasonableness in [consent] cases is the great significance given to widely shared social expectations, which are [naturally enough] influenced by property law but not controlled by its

will presume one does not waive Fourth Amendment rights to be free from unreasonable searches; however, when officers show that waiver is voluntary, it can be effective.<sup>26</sup> Consent, or waiver of Fourth Amendment rights, is a matter to be determined on a case-by-case basis, taking into account whether the consentor is the individual whose property is being searched, a third party with common authority over the

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rules . . . [A] solitary co-inhabitant may sometimes consent to a search of shared premises . . . [and] the reasonableness of such a search is in significant part a function of commonly held understandings about the authority that co-inhabitants may exercise in ways that affect each other's interests.

*Id.* See also *Stoner v. California*, 376 U.S. 483 (1964) (noting that even when consent is given, police officers should assess the surrounding circumstances to be sure that a reasonable person would not doubt the truth of the assertion of authority to consent). “Consent to a search is voluntary when it is unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion.” *Searches and Seizures*, *supra*, § 135. Further, the burden of justifying an otherwise unlawful search using consent is placed upon the prosecution to prove “the consent was, in fact, freely and voluntarily given.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

Factors that aid in determining whether consent to search was freely given are the age, education, and intelligence and mental health and capability of the person giving consent, whether the person giving consent did so immediately, or only after repeated requests by the police, whether physical coercion was used to obtain consent, whether the person giving consent was in custody, and whether the officer advised the person asked to give consent of the right to refuse.

*Searches and Seizures*, *supra*, § 135 (citing *United States v. Grap*, 403 F.3d 439 (7th Cir. 2005)). There are several factors that may lead to a presumption that the consent given was obtained through coercion. L. A. Bradshaw, Annotation, *Validity of Consent to Search Given by One in Custody of Officers*, 9 A.L.R.3d 858 (1966). “[A]dditional coercive features, such as putting handcuffs on the arrestee or incarcerating him, deceitful conduct on the part of the officers, or their failure to inform the consentor of his constitutional rights, denial of guilt, or evasive conduct,” all create an inference of coercion. *Id.*

26. Bradshaw, *supra* note 25.

[O]ne may waive any constitutional right or privilege, provided that it inheres in the individual and is intended for his sole benefit, and provided further that the waiver is voluntary. However, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights. More specifically, the constitutional right to be secure against unreasonable searches and seizures may be waived.

*Id.* See also *Zap v. United States*, 328 U.S. 624, 628 (1946) (holding that the defendant agreed to the search at issue and made a voluntary waiver of his privacy rights). “[T]he law of searches and seizures as revealed in the decisions of [the Supreme] Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.” *Id.* The Supreme Court does not justify consent searches based on waiver, as it would be detrimental to decisions in other areas of law. DRESSLER, *supra* note 5, at 277. For example, waiver is defined as the relinquishment of a known right or privilege, but the Supreme Court has held that a consent search may be upheld even if the consenting party was not aware that he could refuse. *Id.* The Court has held that it is not necessary for police officers to inform of the right to refuse consent when seeking consent. *Id.* The Supreme Court has employed various other means to validate consent searches including the theory that a consent search is not really a search, as a consenting party retains no reasonable expectation of privacy. *Id.* Currently, the Supreme Court’s chosen method of validation for consent searches is that they are reasonable searches by virtue of the consent that is given. *Id.*

property being searched, or neither.<sup>27</sup> The consent exception provides a valuable tool for law enforcement officials to uncover evidence of crimes they could not otherwise acquire.<sup>28</sup>

### 3. The Special Needs Exception

The Court has also made exceptions to the warrant requirement when special needs of the state, beyond the need for normal law enforcement, make a search reasonable.<sup>29</sup> A showing of special needs

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27. Bradshaw, *supra* note 25; *Schneekloth*, 412 U.S. at 233 (“It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.”).

It cannot be emphasized too much that the determination of the sufficiency of a consent to a search as affected by the status of the consentor as in custody, depends on the particular facts and circumstances of each case, and that there are no hard rules by which the presence of a certain fact . . . will bind the court to a particular decision. Although some facts are intrinsically of more weight than others and will of themselves impose a heavier burden of proof on the government, still the determination ultimately rests on the interplay of the various facts discussed in the annotation, and their probable effect on the individual defendant in the light of his own actions and characteristics and all of the surrounding circumstances.

Bradshaw, *supra* note 25.

28. *Schneekloth*, 412 U.S. at 227-28 (highlighting situations where consent provides evidence of criminal activity and where a consent search proves a further investigation unnecessary).

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

*Id.* But see *Schneekloth*, 412 U.S. at 276-77 (Brennan, J., dissenting) (criticizing the Court’s decision that individuals can waive constitutional rights that they were not even aware they possessed). The use of the consent exception as explained in *Schneekloth* capitalizes on the fact that citizens are not aware of their rights. *Id.* Courts have routinely held that police officers are under no obligation to inform citizens of their right to refuse consent for a search. *Id.*

29. WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS §§ 10:1, 10.3 (2006). The term “special needs” was first used by Justice Blackmun in his concurring opinion to the 1985 case, *New Jersey v. T.L.O.*, a high school search case where “special needs, beyond the normal need for law enforcement, [made] the warrant and probable-cause requirement impracticable.” 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). In *T.L.O.*, the Court held, “The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.” *Id.* at 340. Special needs initially developed from administrative searches, which had to be accompanied by regulations that limited discretion and further required that the primary purpose of the search be separate from crime control. *Stewart*, 468 F. Supp. 2d at 266-67. While the doctrine of special needs is generally accepted, there exist notable

tips the scale sharply in the state's favor when performing the balancing test; the defendant's burden of showing that his liberty and privacy interests outweigh the state's interests is nearly impossible to meet.<sup>30</sup> The special needs exception requires that the search "must serve a primary purpose separate from the general interest in crime control," and that the purpose must be "narrowly tailored to the means used to effectuate that purpose."<sup>31</sup>

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opinions suggesting its illegality. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J. dissenting) (suggesting that by creating exceptions for special needs, the Court is joining the ranks of those who "have allowed basic constitutional rights to fall prey to momentary emergencies"). Courts have identified many examples of situations that constitute a special need. *See e.g., Skinner*, 489 U.S. at 627 (holding that safety sensitive tasks, such as conducting a train, constitute a situation in which there is a special need for warrantless searches). Railroad employees have a diminished expectation of privacy due to their participation in an industry that is highly regulated to ensure safety, safety that is dependent upon on the conditions of employees. *Id.*; *Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (holding that seeking evidence to solve a specific crime is a special need); *Illinois v. Lidster*, 540 U.S. 419 (2004) (holding that a police checkpoint for the purpose of seeking information about a hit-and-run homicide was not prohibited by the Fourth Amendment. Further, "brief, suspicionless seizures at highway checkpoints for purposes of combating drunk driving and intercepting illegal immigrants" are not outlawed by the Fourth Amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) ("Stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."). The Court has also found several notable situations that do not constitute a special need. *See e.g., Nat'l Treasury Employees Union v. Van Raab*, 489 U.S. 656, 684 (1989) (Scalia, J., dissent) (finding the government's purpose in conducting random urine testing of Customs Service employees to protect the integrity of the agency to be too generalized and speculative to be reasonable); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that a hospital policy requiring pregnant women to submit to drug testing was not valid because its primary purpose was law enforcement).

30. RINGEL, *supra* note 29. *See e.g., People v. Burgener*, 714 P.2d. 1251 (Cal. 1986) (holding institutional security to be a special need). The *Burgener* Court further explained, A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security.

*Id.* at 1267.

The balance thus falls heavily on the side of the governmental interest in public safety, and leads to a conclusion that the appropriate standard of reasonableness to justify a parole search is a reasonable suspicion on the part of the parole officer that the parolee is again involved in criminal activity, or has otherwise violated his parole, and the search may turn up evidence of that activity, or that evidence of a proposed future violation by the parolee will be uncovered. That suspicion must of course be based on articulable facts which together with rational inferences from those facts warrant objectively reasonable suspicion.

*Id.* at 1271.

31. *United States v. Stewart*, 468 F. Supp. 2d 261, 267-68 (D. Mass. 2007). It is dispositive that the search must serve a purpose apart from a general interest in crime control. Reindl, *supra* note 6, at 130. "If the only concern in the context of probation was to enforce laws, departure from

### C. Carving Away at the Fourth Amendment

Beginning in the mid-1980s, the Supreme Court handed down a series of cases that helped escalate the Fourth Amendment's move from domination by the traditional unitary approach to a test of reasonableness.<sup>32</sup> Together, these cases created confusion as to the proper method of evaluating a Fourth Amendment case.<sup>33</sup>

#### 1. *Hudson v. Palmer*<sup>34</sup> takes Fourth Amendment Rights from Prisoners

In 1984, the Supreme Court ruled in *Hudson v. Palmer* that prisoners have no reasonable expectation of privacy and are subject to suspicionless searches at any time.<sup>35</sup> The Court determined that the institution of prison "carries with it the circumscription or loss of many significant rights" necessary to accommodate the needs of the prison environment.<sup>36</sup> The state has an immense need to maintain prison conditions, and the environment of the prison itself makes it impracticable to require warrants before conducting searches.<sup>37</sup> The

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the probable cause requirement would likely never have been declared constitutionally permissible." *Id.*

32. See *supra* Part II.B and note 18.

33. See *infra* Part II.C.2. Cases have created a split between jurisdictions as to whether the balancing test or the special needs test is the appropriate test to use for determining Fourth Amendment rights. *State v. O'Hagen*, 914 A.2d 267, 273 (N.J. 2007).

34. 468 U.S. 517 (1984). On September 16, 1981, Hudson, an officer at a correctional center, along with another officer, conducted a shakedown of Palmer's prison locker and cell. *Id.* at 519. The officers discovered a torn pillowcase in Palmer's trash can and subsequently filed charges against Palmer for destroying state property. *Id.* at 519-20. Palmer was found guilty in a disciplinary hearing and ordered to pay for the destroyed material. *Id.* at 520. Palmer then filed a § 1983 action alleging that Hudson had conducted the search of his cell and brought false charges against him for the purpose of harassment. *Id.* Further, Palmer alleged that Hudson had intentionally destroyed some of his possessions during the search, constituting a violation of Palmer's Fourteenth Amendment right not to be deprived of property without due process of law. *Id.* The District Court granted Hudson summary judgment. *Id.* The Court of Appeals reversed the grant of summary judgment and remanded the case, holding that summary judgment on the claim that the search was unreasonable was not warranted given the facts of the situation. *Id.* at 520-21. The Supreme Court granted certiorari on the issue of whether prisoners have a right to privacy in their cells entitling them to Fourth Amendment protections. *Id.* at 522.

35. *Id.* at 526. Prisoners have no reasonable expectation of privacy that society is willing to recognize as legitimate. *Id.*

36. *Id.* at 524. The needs in a prison environment include maintaining internal security and keeping conditions sanitary. *Id.* at 524-27. Security is necessary to protect the safety of inmates, officers, and visitors. *Id.* at 526-27.

37. It is not accurate to say that a prisoner lacks privacy rights. See *Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997) ("[T]he Fourth Amendment right . . . to be secure against unreasonable searches and seizures 'extends to incarcerated prisoners.'" (quoting *Michenfelder v.*

Court's holding in *Hudson* was narrowly tailored to address issues surrounding Fourth Amendment rights of prisoners and left issues surrounding others involved in the criminal justice system unaddressed.<sup>38</sup>

## 2. Two Approaches to Probation Searches – *Griffin v. Wisconsin*<sup>39</sup> and *United States v. Knights*<sup>40</sup>

In 1987, the Supreme Court again looked to the privacy rights of those in the criminal justice system, this time holding in *Griffin v. Wisconsin* that warrantless searches of probationers are consistent with the Fourth Amendment.<sup>41</sup> The Court justified the search by explaining

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Sumner, 860 F.2d 328, 332 (9th Cir. 1988)). Instead, prisoners are denied many aspects of Fourth Amendment protection because it "is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security." *Hudson*, 468 U.S. at 524 (citations omitted).

Prisons, by definition, are places of involuntary confinement of persons who have demonstrated proclivity for anti-social criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

*Id.* at 526. "The administration of a prison, we have said, is 'at best an extraordinarily difficult undertaking.' But it would be literally impossible to accomplish the prison objectives identified above if inmates retained a right to privacy in their cells." *Id.* at 527 (citations omitted).

38. *See id.* at 526-27.

39. 483 U.S. 868 (1987). Joseph Griffin was sentenced to probation for felony charges of resisting arrest, disorderly conduct, and obstructing an officer. *Id.* at 870. As a condition of his probation, Griffin was subject to a search condition that required him to consent to searches at any time if the probation supervisor agreed to the search and there were reasonable grounds to believe that contraband was present. *Id.* at 870-71. After receiving information that Griffin was in possession of guns, probation officers conducted a search of his residence without obtaining a warrant. *Id.* at 871. A gun was found at Griffin's residence, and Griffin was indicted on a state law charge of being a felon in possession of a firearm. *Id.* Griffin's motion to suppress the gun was denied, and he was convicted and sentenced to two years imprisonment. *Id.* The Wisconsin Court of Appeals and Wisconsin Supreme Court affirmed the decision. *Id.* The United States Supreme Court granted certiorari to decide whether the search of Griffin's residence violated the Fourth Amendment. *Id.* at 870.

40. 534 U.S. 112 (2001). Mark James Knights was sentenced to California state probation for a drug offense. *Id.* at 114. As a condition of probation, he agreed to submit his person, residence, and effects to search at any time without cause to a probation or law enforcement officer. *Id.* After police developed reasonable suspicion that Knights had been involved in acts of vandalism and arson, a police detective conducted a search of Knights's apartment. *Id.* at 114-15. Knights was arrested and indicted. *Id.* at 116. At trial, the District Court granted Knights's motion to suppress the evidence obtained from his apartment on the grounds that the search condition was limited to probation searches and did not include investigative searches. *Id.* The Ninth Circuit affirmed. *Id.* The Supreme Court granted certiorari to determine if the search in question violated the Fourth Amendment. *Id.*

41. *Griffin*, 483 U.S. at 870. While the Court did hold warrantless searches of probationers

that the special needs exception “satisfies the demands of the Fourth Amendment because [the search] was carried out pursuant to a regulation that itself satisfies the Fourth Amendment’s reasonableness requirement under well-established principles.”<sup>42</sup>

In 2001, the Supreme Court reached the same holding in *United States v. Knights* in a strikingly different way, this time explicitly holding that no more than reasonable suspicion is required to search a probationer.<sup>43</sup> The Court found that the state has considerable interests in supervising probationers due to the dual goals of probation – rehabilitating offenders and protecting society.<sup>44</sup> Probationers are more likely than law-abiding citizens to commit crimes and have a larger incentive to hide their criminal activities.<sup>45</sup> The Court declined to opine on whether the condition present in *Knights*’s probation constituted consent for the purposes of waiver of Fourth Amendment rights.<sup>46</sup>

After the *Knights* decision, there were two viable methods for conducting warrantless searches of probationers that satisfied the Fourth

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constitutional, the search in *Griffin* was supported by reasonable suspicion and thus the Court left open the issue of suspicionless searches. *United States v. Stewart*, 468 F. Supp. 2d 261, 268-69 (D. Mass. 2007). Probation is “a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison.” BLACKS LAW DICTIONARY (8th ed. 2004). In contrast, parole is “the release of a prisoner from imprisonment before the full sentence has been served.” *Id.* Parole is not always available, but is traditionally granted for good behavior, subject to certain conditions. *Id.* “The essence of parole is release from prison, before completion of the sentence, on condition that the prisoner abide by certain rules during the balance of the sentence. Parole is not freedom.” 59 AM. JUR. 2D *Pardon and Parole* § 6 (1987).

42. *Griffin*, 483 U.S. at 873.

43. *Knights*, 534 U.S. at 122. *But see* *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005) (determining that reasonable suspicion is not a necessary factor for probationer searches where the probationer has signed a waiver of his Fourth Amendment protections). The Seventh Circuit is the only circuit which has eliminated reasonable suspicion as a requirement for searches of probationers. *Reindl*, *supra* note 6, at 124. The Seventh Circuit explains, “not only was a probationer’s expectation of privacy diminished, it was eliminated by contract.” *Id.* at 131.

44. *Knights*, 534 U.S. at 119.

45. *Id.* at 120. Probationers have a large incentive to conceal their criminal activities and to dispose of evidence that could incriminate them because they are aware that they are being closely monitored and if they are caught in an illegal activity, or activity that violates the conditions of their probation, they will be subject to revocation of their probation, which quite possibly will mean incarceration for many probationers. *Id.* Further, the revocation proceedings do not afford the protections offered in a criminal trial. *Id.* Specifically, there is no right to a jury trial or requirement that the offenses be proved beyond a reasonable doubt in a probation revocation hearing. *Id.*

46. *Id.* at 118. In *Knights*, the State argued that *Knights* voluntarily accepted a search requirement as a condition of not going to prison. *Id.* The Court refused to decide the case on consent grounds, but concluded that “the search of *Knights* was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances,’ with the probation search condition being a salient circumstance.” *Id.* (citation omitted).

Amendment, yet neither case sheds light on how to handle searches lacking suspicion.<sup>47</sup>

### 3. California Strips Away Parolees' Rights

In 1998, the Supreme Court of California analyzed the issue of parolees' Fourth Amendment rights in *People v. Reyes*.<sup>48</sup> Previous precedent dictated that a parolee subject to a search condition retained a diminished expectation of privacy; therefore, any search of his person must be supported by reasonable suspicion.<sup>49</sup>

Despite this precedent, the Court found that reasonable suspicion is not mandatory to search a parolee.<sup>50</sup> The Court also determined that the consent exception did not apply because, under California statute, parole is not a choice for the prisoner.<sup>51</sup> The Court applied the traditional

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47. *United State v. Stewart*, 468 F. Supp. 2d 261, 269 (D. Mass 2007). The *Knights* court extended the *Griffin* decision to cover all searches of probationers with reasonable suspicion, even those that were investigative, and not probationary as required to meet the special needs analysis of *Griffin*. Reindl, *supra* note 6, at 130.

48. *People v. Reyes*, 968 P.2d 445 (Cal. 1998). Reyes was released on California state parole, subject to a search condition. *Id.* at 446. After receiving an anonymous tip, Reyes's parole officer contacted police and asked them to find out if Reyes was using drugs. *Id.* Police searched a shed at Reyes's residence and found small amounts of methamphetamine. *Id.* The trial court denied Reyes's motion to suppress the evidence, holding that the officers had reasonable suspicion. *Id.* The Court of Appeals reversed, finding no reasonable suspicion. *Id.* The California Supreme Court granted certiorari to decide if the search of a parolee's residence requires reasonable suspicion. *Id.*

49. *People v. Burgener*, 714 P.2d 1251, 1269 (Cal. 1986) (holding that a search of a parolee in California must have a parole supervision purpose). Thus, a parolee search:

must be based on information which leads the parole agent who conducts or authorizes the search to believe that the parolee has violated the law or another condition of his parole, or is planning on doing so. Were this not so, a parole search would not only invade the parolee's reasonable expectation of privacy, but would unreasonably intrude into the privacy interests of persons with whom the parolee associates or resides.

*Id.* In *In re Tyrell J.*, the court moved one step further in the case of juveniles, declaring that juvenile probationers have no reasonable expectation of privacy. *In re Tyrell J.*, 876 P.2d 519, 521 (Cal. 1994) ("Because the minor was subject to a valid condition of probation that required him to submit to warrantless searches by 'any' law enforcement officer, he had no reasonable expectation of privacy . . ."). The Court in *Tyrell* noted that there is a difference between adult probation and juvenile probation that makes it possible that "a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court." *Id.* at 526.

50. *Reyes*, 968 P.2d at 447 ("[A] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable,' the court stopped short of equating reasonableness with particularized suspicion.") (quoting *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

51. *Id.* at 448. The consent justification cannot operate in accordance with the Determinate Sentencing Act. *Burgener*, 714 P.2d at 1266. The act mandates a minimum term of three years parole for all prisoners who have served a determinate term. *Id.* at n.12. The parolee has no choice as to whether to accept the parole, and "[t]he Board of Prison Terms has no discretion to grant or withhold parole to a prisoner who has served a determinate term." *Id.* Voluntary consent cannot be

balancing test and determined that, because of his status, a parolee has a significantly diminished, but still existent, liberty to be free from unreasonable searches and seizures.<sup>52</sup> California has a significant interest in determining whether parolees obey the law.<sup>53</sup> The state's interest coupled with the fact that the parolee put himself in the situation where it became necessary for the state to monitor his behavior results in the balance tipping in favor of the state.<sup>54</sup> Safeguards, such as California's prohibition against arbitrary, capricious, or harassing searches, provide sufficient protection for the parolee's diminished Fourth Amendment rights.<sup>55</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts*

In September 2002, while Donald Curtis Samson was walking down a public street, he was approached by Officer Alex Rohleder of the San Bruno Police Department.<sup>56</sup> At the time of the stop, Samson was on

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found in the absence of choice, and therefore "Section 3000, subdivision (a), is a mandatory 'kick-out' [provision]." *Id.* The California legislature has found that "the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship." Brief for the Petitioner at 1-2, *Samson v. California*, 547 U.S. 843 (2006). Further, to "provide for the supervision of and surveillance of parolees," and "to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge," California law requires that a sentence include parole. *Id.*

52. *Burgener*, 714 P.2d at 1267. The "conditions which necessitate and thereby justify total curtailment of a prisoner's Fourth Amendment rights are not present once he is free on parole." *Id.*

53. *Reyes*, 968 P.2d at 450 ("[T]he threat of a suspicionless search is fully consistent with the deterrent purposes of the search condition. The purpose of an unexpected, unprovoked search of a defendant is to ascertain whether the parolee is complying with the terms of parole; to determine not only whether he disobeys the law, but also whether he obeys the law. Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant.").

54. *See id.* at 450-51; *see also supra* note 30 (comparing the burden that a prisoner must face in the balancing test). "The level of intrusion is de minimis and the expectation of privacy greatly reduced when the subject of the search is on notice that his activities are being routinely and closely monitored. Moreover, the purpose of the search condition is to deter the commission of crimes and to protect the public, and the effectiveness of the deterrent is enhanced by the potential for random searches." *Id.* at 451.

55. *Id.* (explaining that a parolee search would be unreasonable "if made too often, or at an unreasonable hour, or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer"). *But see infra* note 108 (discussing how California's prohibition on arbitrary, capricious, and harassing searches provides little protection for parolees).

56. *Samson v. California*, 547 U.S. 843, 846(2006). Samson was stopped on September 6, 2002, while walking "along a busy thoroughfare between a residential area and a major shopping area, near 'family homes' and a school" in San Bruno, California, with a woman, Deborah Watson

California state parole.<sup>57</sup> Rohleder conducted a search of Samson's person based solely on Samson's parolee status, pursuant to provisions of the California Penal Code.<sup>58</sup> Upon searching Samson, Rohleder

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and her three-year-old son. *People v. Samson*, No. A102394, 2004 WL 2307111, \*1-2 (Cal. App. 1st Dist. Oct. 14, 2004), *aff'd*, 547 U.S. 843 (2006); *see also* Brief for the Petitioner at 4, *Samson v. California*, 547 U.S. 843 (2006).

57. *Samson*, 547 U.S. at 846. Samson had been convicted of being a felon in possession of a firearm, had served prison time, and had been released on parole. *Id.* California parole operates distinctively from other state parole systems. As detailed in the California Penal Code, “[a]t the expiration of a term of imprisonment . . . the inmate *shall* be released on parole . . . unless . . . the parole authority for good cause waives parole and discharges the inmate from the custody of the department.” CAL. PENAL CODE § 3000(b)(1) (West 2006) (emphasis added). Under the Determinate Sentencing Act of 1976, the state of California announced to the public that parole is not a choice. *People v. Reyes*, 968 P.2d 445, 448 (Cal. 1998). The prisoner must be offered parole, and he must accept it. *Id.* Though the California legislature continues to refer to parole as a privilege, the practical application of parole vests a right in a prisoner who has been imprisoned for a prescribed period of time to be released on parole regardless of whether the inmate is prepared to integrate into society. *Samson*, 547 U.S. at 854. The theory of parole as a privilege or an “act of grace” was rejected by the Supreme Court in *Morrissey v. Brewer*. Brief for the Petitioner at 13, *Samson v. California*, 547 U.S. 843 (2006). According to a study by the Justice Policy Center of the Urban Institute, less than one percent of prisoners released on California state parole are released as a result of a discretionary ruling by a parole board. Jeremy Travis & Sarah Lawrence, *Beyond the Prison Gates: The State of Parole in America*, JUSTICE POLICY CENTER, URBAN INSTITUTE 4 (Nov. 5, 2002), available at <http://www.urban.org/url.cfm?ID=310583> [hereinafter URBAN INSTITUTE]. California is one of the few states (Oregon and Rhode Island, also) that place almost all prisoners on some form of supervision following release. *Id.* at 9. “Consequently, inmates may be released early regardless of their capacities to reintegrate themselves into society or the threat they pose to the communities to which they return. Many parolees, perhaps most of them, require intense supervision.” Respondent’s Brief on the Merits at 16, *Samson v. California*, 547 U.S. 843 (2006).

58. *Samson*, 547 U.S. at 846-47. Rohleder was aware that Samson was on parole through prior contact with Samson. *Id.* at 846. Initially Rohleder thought that there was a parole violation warrant for Samson’s arrest. *Id.* Rohleder first conducted a pat-down search of Samson for weapons, and found none. Brief for the Petitioner at 4, *Samson v. California*, 547 U.S. 843 (2006). Upon questioning, Samson informed Rohleder that there was no warrant. *Samson*, 547 U.S. at 846. Officer Rohleder confirmed through radio dispatch that there was no warrant for Samson’s arrest and that Samson was on California state parole. *Id.* Rohleder decided to conduct a search of Samson pursuant to California statute. *Id.* Rohleder waited to conduct the parolee search until another officer arrived on the scene between two and ten minutes later. Respondent’s Brief on the Merits at 4, *Samson v. California*, 547 U.S. 843 (2006). The pertinent California statute reads, “Any inmate who is eligible for release on parole pursuant to this chapter shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.” CAL. PENAL CODE § 3067(a) (West 2006). Officer Rohleder also asked Deborah Watson, Samson’s companion, to empty her pockets. *People v. Samson*, 2004 WL 2307111, at \*2. Officer Rohleder did not find anything incriminating on Watson’s person, and instructed her to leave the scene. *Id.* Officer Rohleder testified that Watson consented to the search, while Watson maintained that Officer Rohleder never asked for her permission before instructing that she empty her pockets. *Id.* The *Samson* Court found that an officer must know that a person is on parole prior to the search in order to use the California statute permitting parolee searches as a justification for the search. *See United States v. Felix*, No. 06cr1948 BTM, 2007 WL 173892, \*7 (S.D. Cal. Jan. 9, 2007) (noting that the government’s contention that a defendant’s parolee status limits his expectation of privacy to such a

found a small amount of methamphetamine.<sup>59</sup> Pursuant to California law, the state charged Samson with possession of methamphetamine.<sup>60</sup>

### B. Procedural History

At trial, the judge denied Samson's motion to suppress the methamphetamine found on his person at the time of his arrest.<sup>61</sup> The jury convicted Samson, sentencing him to seven years imprisonment.<sup>62</sup> Samson appealed to the California Court of Appeals.<sup>63</sup> The Appeals

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degree that he cannot protest to a search made by officers who are not aware of his parolee status is not supported by the Court's decision in *Samson*).

59. *Samson*, 547 U.S. at 847. The drugs were found in a plastic baggie inside of a cigarette box, located in Samson's left breast pocket. *Id.*

60. *Id.* Samson was charged pursuant to a California statute which reads in relevant part, "every person who possesses any controlled substance . . . unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year or in the state prison." CAL. HEALTH & SAFETY CODE § 11377(a) (West 2006).

61. *Samson*, 547 U.S. at 847. The judge found that California statute authorized the search, and Officer Rohleder did not perform the search in an arbitrary or capricious manner, therefore, there was no ground on which to grant Samson's motion to suppress the evidence. *Id.* A San Mateo County jury found Samson guilty. Respondent's Brief on the Merits at 4, *Samson v. California*, 547 U.S. 843 (2006).

62. *Id.*; see also *supra* note 60 (explaining that the statutory authority for Samson's charge authorizes a maximum term of up to one year in jail). Samson's enhanced sentence of seven years was assigned according to California codes stating, "[i]f a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction," CAL. PENAL CODE § 1170.12(c)(1) (West 2006), and:

where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefore, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

CAL. PENAL CODE § 667.5(b) (West 2006). Specifically, the trial court found that Samson "had committed four prior felonies, including in 1997 the possession by a felon of a firearm, in violation of the California Penal Code for which he was on parole at the time of the search." Respondent's Brief on the Merits at 4, *Samson v. California*, 547 U.S. 843 (2006). Samson challenged the trial court's imposition of an upper term at the California Court of Appeals. *People v. Samson*, No. A102394, 2004 WL 2307111, \*3 (Cal. Dist. Ct. App. Oct. 14, 2004) *aff'd*, 547 U.S. 843 (2006). Samson unsuccessfully argued that the trial court had committed an error due to the recent Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004), because there was no jury finding to support the imposition of an upper term. *Id.* The Supreme Court later validated Samson's argument in *Cunningham v. California*, 549 U.S. 270 (2007) (holding that California's determinate sentencing law which allowed judges, not juries, to find facts leading to enhanced sentencing violated the defendant's right to a jury trial). The Appellate Court found that Samson had forfeited any claim he may have had by failing to request a jury trial, and further, that this issue was deemed waived on appeal because it was not raised at trial. *Samson*, 2004 WL 2307111, at \*4.

63. *Samson*, 547 U.S. at 847. Samson argued that the drug evidence should have been

Court affirmed the decision of the lower court.<sup>64</sup> Relying on California case law, the Appeals Court repeated that suspicionless searches of parolees are permissible under California law.<sup>65</sup> In 1998, the California Supreme Court held in *People v. Reyes* that searching a parolee does not require individualized suspicion.<sup>66</sup> The Supreme Court of California, having already decided the issue, denied Samson's petition for certiorari.<sup>67</sup>

### C. Supreme Court's Decision

The United States Supreme Court granted certiorari to review the constitutionality of California's suspicionless search in light of the

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suppressed at trial because it was the product of an illegal search. *Id.* The search was illegal, first, because it was not performed in response to a reasonable suspicion and, second, because the search was arbitrary, capricious, and harassing. *Samson*, 2004 WL 2307111, at \*2-3. The state argued that the search was valid according to California statute and was performed for legitimate rehabilitative and governmental purposes and therefore was not arbitrary, capricious, or harassing. *Id.* Samson also set forth a *Blakely v. Washington* claim, alleging that his Sixth Amendment rights had been violated by the trial court based on the way they had calculated his sentence. *Id.* at \*3. The Court of Appeals declined to make a finding on this issue, but held that any error that could have occurred at trial was harmless. *Id.* at \*7. The appellate court issued Samson three days of credit toward his prison term. *Id.* at \*3.

64. *Samson*, 2004 WL 2307111, at \*11. The unpublished opinion of the California Appeals Court was written by Judge Swager. *Id.* at \*1. The appellate court reviews the trial court's denial of a motion to suppress de novo. *United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007).

65. *Samson*, 547 U.S. at 847; see also *supra* note 58 (quoting the text of the California statute which authorizes suspicionless searches of parolees). The court relied primarily on *People v. Reyes*, 968 P.2d 445 (Cal. 1998).

66. In *Reyes*, a parolee's premises were searched pursuant to an anonymous tip that parolee was using drugs. *Reyes*, 968 P.2d at 446. The court held that search of a parolee does not require reasonable suspicion, because a parolee's expectation of privacy is not violated unless the search is arbitrary, harassing, or not conducted pursuant to a parole condition. *Id.* at 450-51. The Court did not consider whether or not there was actual reasonable suspicion in this situation, but an opinion concurring only in the judgment by Justice Kennard found reasonable suspicion. *Id.* at 453 (Kennard, J., concurring and dissenting).

67. *Samson*, 547 U.S. at 847. The California Supreme Court denied Samson's petition for certiorari without prejudice, in anticipation of a change in California law regarding Samson's position as a result of the decisions in *People v. Black* and *People v. Towne*. *People v. Samson*, No. A102394, 2004 WL 2307111, \*2-3 (Cal. Dist. Ct. App. Oct. 14, 2004), *aff'd*, 547 U.S. 843 (2006). The California Supreme Court also relied on precedent. *Samson*, 547 U.S. at 847. "Stare decisis encourages courts to follow their own prior decisions, and it requires lower courts to follow decisions of higher courts in the same jurisdiction." WILSON HUHNS, THE FIVE TYPES OF LEGAL ARGUMENT 42 (Carolina Academic Press 2002). However, there are some discrepancies in whether the *Reyes* case actually creates precedent that the court must follow. See *supra* note 66 (noting that reasonable suspicion may have been present in *Reyes*). Stare decisis only applies to the holding of prior cases, not to judicial reasoning that is unnecessary to the decision and therefore has no binding effect on other courts. HUHNS, *supra*, at 42.

reasonable expectation of privacy afforded to citizens under the Fourth Amendment.<sup>68</sup>

### 1. Majority Opinion

The Supreme Court affirmed the decision of the California Court of Appeals in a six to three decision, finding that a parolee's reasonable expectation of privacy is severely diminished.<sup>69</sup> The Court used a Fourth Amendment balancing test to weigh the state's interests against Samson's expectation of privacy.<sup>70</sup> In order to determine the privacy interests of a parolee, the Court looked to several cases.<sup>71</sup> First, the Court recognized in *Griffin v. Wisconsin* that there exists a continuum of possible punishments, stretching from lengthy prison terms to probation or community service.<sup>72</sup> Parole falls somewhere in between imprisonment and probation on this continuum; therefore, parolees have an expectation of privacy somewhere between that of a probationer<sup>73</sup> and a prisoner.<sup>74</sup> The Supreme Court, in *Morrissey v. Brewer*, found that parole lies closer to imprisonment on the continuum, remarking that "parole is an established variation on imprisonment of convicted criminals. . . . The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abides by certain rules during the balance of the sentence."<sup>75</sup> The extent of the

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68. *Samson*, 547 U.S. at 847. The Fourth Amendment states:

[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The issue of whether California's suspicionless search violates the Fourth Amendment is one of first impression for the Supreme Court. In *United States v. Knights*, the court looked to a probationer search conducted pursuant to reasonable suspicion and left the status of suspicionless searches up in the air. See *United States v. Knights*, 534 U.S. 112 (2001); see *supra* Part II.C.2.

69. *Samson*, 547 U.S. at 857. Justice Thomas authored the opinion of the Court and was joined by Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Ginsburg, and Justice Alito. *Id.* at 845.

70. *Id.* at 848.

71. *Id.* at 848-52.

72. *Id.* at 848. The Supreme Court in *Griffin* identifies several other possible punishments, including solitary confinement in a maximum security prison, confinement in a maximum, medium, or minimum security prison, work release programs, halfway houses, community service hours, and probation. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

73. *Samson*, 547 U.S. at 850; see *Knights*, 534 U.S. 112 (explaining probationers' lowered expectations of privacy); see also *supra* Part II.C.2.

74. *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (noting that prisoners have a diminished expectation of privacy by virtue of the institutional setting).

75. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The Court in *Morrissey* further explains

conditions placed on parolees is demonstrative of the lowered expectations of privacy that parolees have as a result of their status.<sup>76</sup> Finally, because a parolee is aware of the conditions placed upon him and has signed off on them, the parolee does not have an expectation of remaining free from suspicionless searches that society would recognize as legitimate.<sup>77</sup>

On the other hand, the state's interests are considerable. The state has an interest in imposing harsher supervision on parolees because parolees are more likely to commit future crimes.<sup>78</sup> Parole restrictions combat recidivism, promote reintegration of parolees into the community, and encourage positive citizenship among parolees.<sup>79</sup> In

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that revocation of parole does not deprive a parolee of "the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependant on observance of special parole restrictions." *Id.* at 480. *But see* William R. Rapson, Note, *Extending Search-and-Seizure Protection to Parolees in California*, 22 STAN. L. REV. 129, 133 (1969) ("[I]n most cases the life of a parolee more nearly resembles that of an ordinary citizen than that of a prisoner. The parolee is not incarcerated; he is not subjected to a prison regimen, to the rigors of prison life and the unavoidable company of sociopaths. . . . The parolee lives among people who are free to come and go when and as they wish. Except for the conditions of parole, he is one of them."). "The liberty of a parolee, although indeterminate, includes many of the values of unqualified liberty." *Morrissey*, 408 U.S. at 482.

76. *Samson*, 547 U.S. at 851. Parolees endure considerable restrictions on their liberty while on parole. *Morrissey*, 408 U.S. at 478. Typical restrictions include, but are not limited to, parolees being forbidden to drink alcohol and associate with certain people, particularly known criminals. *Id.* Parolees must typically seek permission from their parole officer before moving, changing employment, leaving the state for any reason, marrying, using or buying a vehicle, or incurring debt. *Id.* Further, parolees must report to their assigned parole officer on regular intervals and make periodic written reports to the parole officer. *Id.* Parolees are not permitted to own or use weapons. URBAN INSTITUTE, *supra* note 57. Failure to meet these conditions can result in the parolee being returned to prison for the remainder of their term. *Morrissey*, 408 U.S. at 478-79. In *Samson*, "the Court 'back-tracked' on its past findings that probationers and parolees are owed the same diminished expectations of privacy." Reindl, *supra* note 6, at 135. The Court explained that the government's concern from both *Knights* and *Griffin* of preventing concealment of crime is an even stronger argument when applied to parolees. *Id.* The Court distinguished the public risk of releasing prisoners on parole from the lesser risk of probationers who have not been imprisoned and may have committed minor crimes. *Id.*

77. *Samson*, 547 U.S. at 852; *see supra* note 51 (detailing earlier court's handling of the consent exception). The Supreme Court declined to decide *Samson* on consent grounds. *See Samson*, 547 U.S. at 852 n.3; *see also* Criminal Justice Legal Foundation, Searches, Parolees, Reasonableness, and GPS, [http://www.crimeandconsequences.com/2006/06/searches\\_of\\_parolees.html#more](http://www.crimeandconsequences.com/2006/06/searches_of_parolees.html#more) (last visited Jan. 19, 2007).

78. *Samson*, 547 U.S. at 853 (citing *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365 (1998)); *see supra* note 45 (discussing the reasons that probationers are more likely to commit crimes than those not on probation).

79. *Id.* *See also supra* note 75 (listing common parole restrictions). Advocates of parole contend,

the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the supervision of and surveillance of parolees and to provide

California, there is a sixty-eight to seventy percent recidivism rate among parolees, highlighting the State's heightened interest in combating parolee recidivism and the grave safety concerns created by parolees on the street.<sup>80</sup>

The Court found that the balance tips sharply in favor of allowing California the right to combat recidivism using a method that works for California's specific problems.<sup>81</sup> Requiring individual suspicion would undermine the state's ability to effectively supervise parolees and thus give parolees a greater opportunity to anticipate searches and conceal their criminal activity.<sup>82</sup>

The Court quickly dismissed an array of other arguments Samson offered.<sup>83</sup> First, the Court said there is no merit to the argument that a majority of states and the Federal government required individualized suspicion before allowing a warrantless search of a parolee.<sup>84</sup> Though

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educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge.

People v. Burgener, 714 P.2d 1251, 1267 (Cal. 1986).

80. *Samson*, 547 U.S. at 853-54. California's grave safety concerns stem from the fact that the state has the highest recidivism rates in the nation. *Id.* Further, sixty-two percent of parolees nationwide come from only five states – California, Texas, Pennsylvania, New York, and Illinois. URBAN INSTITUTE, *supra* note 57, at 14. California has the largest parole population, with parolees comprising eighteen percent of total parolees nationwide in 2000. *Id.* California places ninety-eight percent of its releases on parole; forty-two percent of parolees return to prison. *Id.* “A state's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees warrant privacy intrusion that would not otherwise be tolerated under the Fourth Amendment.” *Samson*, 547 U.S. at 853; *see also* *Ewing v. California*, 538 U.S. 11, 12, 26 (2003) (“[R]ecidivism has long been recognized as a legitimate basis for increased punishment and is a serious public safety concern in California and the Nation.”). California's use of this reasoning “is no pretext.” *Id.* “According to a recent report, approximately 67 percent of former inmates released from state prisons were charged with at least one ‘serious’ new crime within three years of their release.” *Id.* *But see* Respondent's Brief on the Merits at 16, *Samson v. California*, 547 U.S. 843 (2006) (“[Petitioner] overlooks the deterrent value of a suspicionless search, which will promote obedience to the law and positive citizenship.”).

81. URBAN INSTITUTE, *supra* note 57, at 14. Sixty-five percent of prison admissions in California are parole violators compared with thirty-five percent nationally. *Id.* However, “[i]t is unlikely that the parolees in Utah and California, the two states with the lowest rates of successful completion (under 20 percent) are so inherently different from the parolees in Massachusetts and Mississippi, the two states who successful completion rates exceed 80 percent.” *Id.* at 19.

82. *Samson*, 547 U.S. at 854; *see supra* note 45 (explaining probationers motivation to conceal criminal activities). Parolees have an even greater motivation to conceal their criminal activities, as they often face lengthy prison sentences in the event of a revocation. *See* URBAN INSTITUTE, *supra* note 57, at 21; *Samson* 547 U.S. at 862 (Stevens J., dissenting) (“Parolees typically will have committed more serious crimes . . . than probationers.”).

83. *Samson*, 547 U.S. at 855-57.

84. *Id.* at 855. Although, the Court declared that what other jurisdictions do does not affect what the Constitution requires, it is still helpful to realize the differences between states. In 2005, the Third Circuit found that warrantless searches “imposed as a condition of pretrial release required a showing of probable cause, despite the defendant's pre-release consent, as protecting the

most states have decided to increase the requirements for searches, this has no bearing upon the constitutional floor set by the Fourth Amendment.<sup>85</sup> The Court also said that there is no merit to the argument that suspicionless searches give blanket discretion to law enforcement officials.<sup>86</sup> The Court concluded that California's prohibition on arbitrary, capricious, or harassing searches provides sufficient protection for parolees' Fourth Amendment rights and, therefore, no additional procedural safeguards are necessary to protect the rights of parolees.<sup>87</sup>

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community from further crime committed by the defendant did not amount to a 'special need.'" RINGEL, *supra* note 29.

85. *Samson*, 547 U.S. at 855.

A state law, even if passed in the exercise of the state's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution. Indeed, even state constitutions cannot subtract from the rights guaranteed by the Federal Constitution, but they can provide additional rights to their citizens, as the Federal Constitution sets a floor for individual rights, while state constitutions establish a ceiling. Therefore, a state constitution is of no effect where it is in conflict with the Constitution of the United States, and provisions in state constitutions have often been held void as inconsistent with federal constitutional provisions. However, a federal court will defer to a state court's interpretation of its own state constitution.

16 AM. JUR. 2D *Constitutional Law* § 51 (2006). Subsequent to the Supreme Court's decision in *Samson*, many questions regarding the constitutional floor set by the Fourth Amendment are left unanswered. Courts may attempt to interpret *Samson* as to say that the Fourth Amendment does not require individualized suspicion in any case. See *United States v. Perkins*, No. 05-CR-30137-DRH, 2006 WL 3718048, \*2-4 (S.D. Ill. Dec. 15, 2006) (finding reasonable suspicion for correctional officers to search a parolee's residence, thereby avoiding deciding whether reasonable suspicion is still required for parolees' residences post-*Samson*). States may also elect to set their floor higher than that mandated by the Constitution, as *Samson* merely allows for searches absent individualized suspicion but does not prevent states from requiring individualized suspicion. *Id.* For an example of an issue where states give greater rights than the Constitution, see *Alabama v. Shelton*, 535 U.S. 654, 668 (2002), noting, "Most jurisdictions already provide a state-law right to appointed counsel more generous than that afforded by the Federal Constitution."

86. *Samson*, 547 U.S. at 856. *Samson* argued that suspicionless searches allow law enforcement officials unlimited discretion to conduct searches. *Id.* Officers in turn inflict dignitary harms on parolees, which encourage feelings of resentment in parolees and thwart efforts at reintegration into society. *Id.*

87. *Id.* According to the California Supreme Court's decision in *People v. Reyes*, it would be unreasonable for a parolee search to be made too frequently, at an unreasonable time of day, of an unreasonably long duration, or for arbitrary reasons. *People v. Reyes*, 968 P.2d 445, 450-51 (Cal. 1998). An arbitrary or capricious search is defined as a search where "the motivation for the search is unrelated to rehabilitative, reformatory or legitimate law enforcement purposes, or when the search is motivated by personal animosity toward the parolee." *Id.* at 451. No California court has ever found that a search of a parolee or probationer violated the standard prohibiting arbitrary, capricious, or harassing searches. Reply Brief for the Petitioner at 6, *Samson v. California*, 547 U.S. 843 (2006).

## 2. Justice Stevens's Dissent

Justice Stevens's dissent<sup>88</sup> stressed his opposition to the majority's unprecedented decision.<sup>89</sup> While in the past the Court separately held that searches of parolees based on suspicion and searches pursuant to a state's special need are constitutional,<sup>90</sup> the Samson Court combined these holdings to make an unprecedented ruling that disregarded the "closely guarded . . . category of constitutionally permissible suspicionless searches."<sup>91</sup>

Justice Stevens attacked the majority's questionable logic of comparing parolees to prisoners for Fourth Amendment purposes.<sup>92</sup> The majority ignored that parolees are not like prisoners.<sup>93</sup> Parolees are "set

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88. Justice Stevens was joined by Justice Souter and Justice Breyer in his dissent. *Samson*, 547 U.S. at 857 (Stevens, J., dissenting).

89. *Id.* Justice Stevens notes that "prior cases have consistently assumed that the Fourth Amendment provides some protection for probationers and parolees." *Id.* Although that "protection is not as robust as that afforded to ordinary citizens." *Id.* (noting that the Court has held reasonable suspicion searches of probationers permissible in *Knights* and has held that the "supervisory responsibility of probation officers . . . may give rise to special needs justifying departures from Fourth Amendment strictures" in *Griffin*). "But neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer." *Id.*

90. *Id.*; see *United States v. Knights*, 534 U.S. 112 (2001) (holding warrantless searches of probationers permissible when reasonable suspicion is found); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding warrantless searches by probation officers permissible pursuant to a special need); see also *supra* Part II.

91. *Samson*, 547 U.S. at 860 (Stevens, J., dissenting) (citing *Chandler v. Miller*, 520 U.S. 305, 309 (1997)) ("[W]hat the Court sanctions today is an unprecedented curtailment of liberty. Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons that do prisoners."). The Court's decision in *Samson* defines just how closely guarded the category of permissible warrantless searches will be.

92. *Id.* at 861. Justice Stevens explains:

Coupling the dubious holding of *Hudson v. Palmer*, with the bald statement that "parolees have fewer expectations of privacy than probationers," the Court two-steps its way through a faulty syllogism and, thus, avoids the application of the Fourth Amendment principles altogether. The logic, apparently, is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy.

*Id.* (citations omitted).

93. *Id.* at 861. The court cites several cases showing that parolees are not like prisoners. According to *United States v. Williams*, there are no constitutional differences between probationers and parolees for Fourth Amendment purposes. *Id.* (quoting *United States v. Williams*, 417 F.3d 373, 376 (2005)). The dissent in *Samson* advocates an approach that requires using the traditional balancing approach while keeping in mind that "the balance is not the same in prison as it is out." *Samson*, 547 U.S. at 864 (Stevens, J., dissenting). See *supra* note 37 (discussing the limited privacy rights of a prisoner and the reasons behind this curtailment of liberty in the institutional setting).

free in the world subject to restrictions intended to facilitate supervision and guard against antisocial behavior.”<sup>94</sup>

Suspicionless searches were the very problem the Framers intended to dispel when they created the Fourth Amendment.<sup>95</sup> The Framers did not intend for the general interest of the state in law enforcement to supersede Fourth Amendment rights absent a showing of special needs by the state.<sup>96</sup> A “broad nonspecific search power” was the evil the Fourth Amendment intended to dispel.<sup>97</sup> The Framers required individual suspicion, while making considerations for special needs so long as safeguards and institutionalized processes were in effect to guide and restrict law enforcement officers.<sup>98</sup>

The dissent recognized that even if suspicionless searches of parolees were not blatant infringements of parolees’ Fourth Amendment rights, they did not serve any legitimate law enforcement purpose or state interest set forth by the majority.<sup>99</sup> Further, California was a clear outlier.<sup>100</sup> A majority of states and the federal government recognized reasonable suspicion as the floor, absent special needs.<sup>101</sup> Reasonable

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94. *Samson*, 547 U.S. at 861 (Stevens, J., dissenting).

95. *Id.* at 858 (Stevens, J., dissenting). The Framers were attempting to stamp out writs of assistance and general warrants, which placed liberty in the hands of every petty officer, and kept the rights of citizens to be “subject to the discretion of the official in the field.” *Id.* at 858; *see supra* Part II.A.

96. *Samson*, 547 U.S. at 858 (Stevens, J., dissenting); *see supra* Part II.A and accompanying notes.

97. *The Supreme Court, 2005 Term – Leading Cases*, 120 HARV. L. REV. 183, 186-87 [hereinafter *Leading Cases*]; *see supra* Part II.A and accompanying notes.

98. *Samson*, 547 U.S. at 858 (Stevens, J., dissenting). California cannot impose a blanket search condition on “all parolees – whatever the nature of their crimes, whatever their likelihood of recidivism, and whatever their supervisory needs – without any programmatic procedural protections.” *Id.* at 865.

99. *Id.* at 863. This decision does not further the goal of reintegrating parolees into the community as the majority suggests. *Id.* at 864-65.

100. *Id.* at 863.

101. *Id.* at 864. “With the possible exception of North Dakota, no State other than California permits police officers to engage in suspicionless, nonconsensual searches of parolees.” Brief for the Petitioner at 28, *Samson v. California*, 547 U.S. 843 (2006).

Thirty States require that nonconsensual parolee or probationer searches be based upon reasonable suspicion or reasonable grounds. In many of those jurisdictions authority to search parolees based upon reasonable suspicion rather than probable cause is limited to parole officers, or police officers working with parole officers. Two additional States (Florida and Iowa) require that parolee searches be based upon probable cause even when undertaken by a parole officer if the evidence will be used in a criminal trial. West Virginia requires probable cause for parolee searches in all cases. Other States (including Kansas, Nebraska, and South Dakota) have upheld parolee searches based upon reasonable suspicion, without expressly holding that reasonable suspicion is required. Where State courts have approved suspicionless searches of parolees or probationers, they have done so on the basis of consent, an individualized determination

suspicion was the shield the Framers selected to guard against the evils of searches and seizures.<sup>102</sup>

Further, Justice Stevens argued the decision in *Hudson* did not call for a blanket loss of Fourth Amendment rights for prisoners.<sup>103</sup> Instead, Justice Stevens reasoned that *Hudson* could best be understood as a special needs case.<sup>104</sup> The prison has strong interests in internal security and institutional needs that do not apply outside of the prison setting.<sup>105</sup> Using *Hudson* to stand for the proposition that prisoners have no Fourth Amendment rights is a clear misinterpretation by the Court.<sup>106</sup>

According to Justice Stevens, if searches absent reasonable suspicion are to be allowed, the creation of programmatic safeguards to ensure that the law is applied fairly is a necessity.<sup>107</sup> California's prohibition on arbitrary, capricious, or harassing searches simply does not have the enforcement capabilities necessary to ensure that the Fourth Amendment rights of parolees are not infringed upon.<sup>108</sup>

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by a court or parole board that a suspicionless search condition was reasonable, or by limiting the authority to conduct the search to parole or probation officers. *Id.* at 28-29. "The experience of these other jurisdictions confirms that governments have effective means to advance their legitimate interests in supervising and searching parolees, and do not need to impose an unlimited regime of suspicionless searches by police officers." *Id.* at 29.

102. *Samson*, 547 U.S. at 866 (Stevens, J., dissenting); see *supra* Part II.A and accompanying notes (discussing the reasons for the Framers including the Fourth Amendment in the Bill of Rights).

103. *Id.* at 862-63; see *supra* Part II.C.2 (discussing *Hudson v. Palmer*).

104. *Id.* at 863 n.3. Generally, the Supreme Court has treated certain types of searches as separate from the special needs exception, including administrative searches, border and checkpoint searches, and other types of searches that are always considered reasonable. DRESSLER, *supra* note 5, at 339. Yet, there is no legitimate reason for distinguishing these categories of searches, including the type of prisoner searches outlined in *Hudson*. *Id.* All of these types of searches involve a specific governmental interest, or a special need, that is outside the ordinary need for investigating crimes. *Id.* All of these searches are judged by the standard of reasonableness. *Id.*

105. *Samson*, 547 U.S. at 862.

106. *Id.* at 850 n.2, 860.

107. *Id.* at 860, 866. Safeguards include administrative procedures and other routines that ensure that laws are applied blindly and limit discretion of police officers. *Id.* Seemingly as an afterthought, the Court throws out the proposition that California's prohibition on arbitrary, capricious, and harassing searches provides sufficient safeguard to limit discretion. *Id.* See also *Katz v. United States*, 389 U.S. 347, 356 (1967) (holding that though the agents acted with restraint, they were not bound by any safeguards). "In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Id.*

108. *Samson*, 547 U.S. at 860 (Stevens, J., dissenting) ("[P]rogrammatic safeguards designed to ensure evenhandedness in application [are necessary] if individualized suspicion is to be jettisoned, it must be replaced with measures to protect against the state actor's unfettered discretion."). See also *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967) ("[B]road statutory safeguards are no substitute for individualized review."). See *supra* note 87 (discussing

#### IV. ANALYSIS

The Court's chosen framework for analyzing *Samson* was only one of three options the Court could have chosen to make their decision.<sup>109</sup> Reasonableness,<sup>110</sup> consent,<sup>111</sup> and the special needs exception<sup>112</sup> are all viable means of analyzing Fourth Amendment challenges.<sup>113</sup> The Court's choice of the reasonableness framework is not surprising given the California Supreme Court's decision that consent is not a viable rationale in California and the special needs framework, which arguably applies to the *Samson* case, is a much more rigid standard to meet than using mere reasonableness.<sup>114</sup>

##### A. *The Reasonableness Standard is not the Appropriate Standard for Limiting Fourth Amendment Protections*

Traditionally, the reasonableness requirement of the Fourth Amendment was interpreted to require a warrant prior to a search unless the search met a previously recognized exception.<sup>115</sup> These exceptions

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the definition of the arbitrary, capricious, and harassing standard).

The California Supreme Court has attempted to address some of these problems by holding that a suspicionless parolee search is unlawful if it is "arbitrary and capricious" because "the motivation for the search is unrelated to rehabilitative, reformatory, or legitimate law enforcement purposes" because it is "motivated by personal animosity toward the parolee," or because it is undertaken by police "at their whim or caprice" and therefore "a form of harassment." In practice, this "arbitrary, capricious, and harassing" standard does not limit the discretion of law enforcement officers. Indeed, so far as we can determine, no California court has ever held that a search of a parolee or probationer was arbitrary, capricious, or harassing. This result is not surprising. So long as the officer states that the motivation for the search is related to the "legitimate law enforcement purpose" of searching for evidence of criminal activity, the search is not arbitrary, capricious, or harassing under California's standard.

Brief for the Petitioner at 20, *Samson v. California*, 547 U.S. 843 (2006).

109. See *supra* Part II.B.1 (explaining the traditional way that Fourth Amendment claims were analyzed) and *supra* Part III.C.1 (detailing the *Samson* Court's reasoning).

110. See *supra* Part II.B.1.

111. See *supra* Part II.B.2.

112. See *supra* Part II.B.3.

113. See *supra* note 33 (validating more than one possible method for assessing the Constitutionality of Fourth Amendment searches).

114. See *infra* Part IV.B.

115. The Fourth Amendment only forbids searches deemed unreasonable, but the Court's view of reasonableness has changed considerably since the adoption of the Fourth Amendment. Amsterdam, *supra* note 24, at 358. In the 1950s, the Supreme Court took a broader and more elastic view of what constitutes an unreasonable search and seizure, but since that time, the Court has increasingly looked to the procedures outlined in the warrant requirement as a means of interpreting reasonableness. *Id.* Using this reasoning, the Court has condemned warrantless searches, subject only to a few exceptions. *Id.* These exceptions fall into three categories - consent searches, routine

are essentially situations in which the balancing test has already been applied and the court has determined that the balance falls in favor of allowing the search in every circumstance.<sup>116</sup> *Samson* provides an example – the balance between parolee’s rights and the state’s needs falls in favor of the state in every instance no matter the particular circumstances of the case or the particular crime involved.<sup>117</sup> Creating another broad exception to the rule, the *Samson* Court held that all searches of parolees are reasonable.<sup>118</sup> This stands in stark contrast to past precedent calling for a case-by-case analysis for reasonableness and limiting the number of exceptions.<sup>119</sup>

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searches, and searches conducted under circumstances that make the warrant requirement impracticable. *Id.*

116. It may be said that the Court only makes the ruling that the state’s interests will *always* outweigh a person’s Fourth Amendment rights in a given situation in rare circumstances. For example, in *Wilson v. Arkansas*, the Supreme Court declined to make a blanket exception to the rule requiring officers to knock and announce their presence before entering a home for cases in which there is a fear that evidence may be destroyed. *Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that while the Fourth Amendment typically requires officers to knock and announce their presence, a no-knock search can be justified by the circumstances of the case). Instead, each time officers wish to bypass the knock and announce rule, a ruling is made on a case-by-case basis by a magistrate. *Id.* Two years later, in *Richards v. Wisconsin*, the Court found that, “[i]n order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). Further, “if a per se exception were allowed for each category of criminal investigation that included a considerable – albeit hypothetical – risk of danger to officers of destruction of evidence, the knock-and-announce element of the Fourth Amendment’s reasonableness requirement would be meaningless.” *Id.* “The fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case.” *Id.*

117. *Samson*, 547 U.S. at 843. This reasoning is rather easy to swallow when one thinks about a habitual drug user or person in possession of illegal firearms, but it becomes much harder to stomach when offenders of non-possession crimes are brought into the mix. *See id.* at 865 (Stevens, J., dissenting). In essence, the Court is saying that the state’s interest in overseeing parolees and making sure they do not recommit crimes justifies suspicionless searches of *all* parolees – “whatever the nature of their crimes, whatever their likelihood of recidivism, and whatever their supervisory needs.” *Id.*

118. *Id.* at 847 (majority opinion). The *Samson* Court does add that not all searches of parolees are reasonable – those that are arbitrary, capricious or harassing are prohibited. *Id.* at 856; *see also supra* note 87 and *infra* Part IV.A.3. All California parolees paroled after January 1, 1997, are subject to the mandatory search condition. *United States v. Akin*, 213 F. App’x 606 (9th Cir. Dec. 20, 2006).

119. 79 C.J.S. *Searches* § 10 (2006) (“Whether a search or seizure is reasonable is determined on a case-by-case basis, considering the totality of the circumstances, and balancing the intrusion on an individual’s privacy and related interests against the promotion of legitimate governmental interests.”). The facts of each case will necessarily differ; as such, the inquiry should extend to “all surrounding circumstances and the nature of the search or seizure itself.” *Id.* What is reasonable in one instance will not necessarily be reasonable “in a different setting or with respect to another kind

### 1. The Court Incorrectly Applied Past Precedent Regarding the Reasonableness Standard to Find the *Samson* Search Reasonable

The Supreme Court has repeatedly emphasized that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”<sup>120</sup> As noted, this rule is typically suspended when probable cause exists, when obtaining a warrant is impracticable, or when some other recognized exception is present.<sup>121</sup>

In *United States v. Place*, the government sought to authenticate a warrantless search by declaring it reasonable according to the Fourth Amendment because the officer had reasonable suspicion of wrongdoing.<sup>122</sup> The Court felt that searches supported only by

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of material.” *Id.* The reasonableness of each search must be evaluated based on the facts as they were known to the officer and as they existed at the time of the search, not from a hindsight perspective. *Id.* See, e.g., *In re Jaime P.*, 146 P.3d 965 (Cal. 2006) (holding that an officer must have knowledge of probationary status prior to conducting a search in order to justify the search on those grounds).

120. *Katz v. United States*, 389 U.S. 347, 357 (1967).

121. *Id.* Warrantless searches and seizures of parolees are permissible because “the constitutional prohibition against unreasonable searches and seizures affords less protection to a parolee than to an ordinary citizen;” therefore, the standards by which reasonableness is measured “are lower than those applicable to ordinary citizens.” 59 AM. JUR. 2D *Pardon and Parole* § 126 (2006).

The measure of protection afforded a parolee lies in a determination of what constitutes a reasonable search under the circumstances. The parole authority must be vested with the power to investigate a parolee to ascertain whether a parole violation has occurred if it is to fulfill its statutory function. Also, an exception to the warrant requirement may be recognized where special needs, such as the needs of a state's parole system, make the warrant and probable-cause requirement impracticable.

*Id.*

A parole search is reasonable if there is a reasonable nexus between the search and the parole process, and a reasonable suspicion, based on articulable facts, that the parolee has violated the terms of the parole or engaged in criminal activity; the parole agent clearly has a parole supervision purpose in a search undertaken to obtain evidence of a parole violation. . . . To have such a purpose, and to avoid an unreasonable invasion of the parolee's privacy, a search must be based on information indicating that the parolee has violated the law or another condition of parole.

*Id.* See also *People v. Williams*, 5 Cal. Rptr. 2d 59 (5th Dist. 1992) (holding that the fact that the defendant was a parolee alone is not sufficient to conduct a search). See also *supra* notes 116 (listing exceptions the Court has made).

122. *United States v. Place*, 462 U.S. 696, 702-03 (1983). Basically, the state is asking the Court to take the principles of *Terry v. Ohio* and apply them to a larger array of search situations. *Id.* “In *Terry* the Court first recognized ‘the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual’s personal security based on less than probable cause.’” *Id.* at 702. Specifically, the Court in *Terry* approved frisking of individuals for the limited purpose of finding weapons so long as reasonable suspicion exists. *Terry v. Ohio*, 392

reasonable suspicion were generally unreasonable, but did declare that in some instances it may be proper to detain<sup>123</sup> persons or seize objects based solely on reasonable suspicion.<sup>124</sup> Never before has the Court held that a search lacking probable cause or reasonable suspicion is reasonable according to the Fourth Amendment absent special needs.<sup>125</sup> The *Samson* Court did not seek to validate the search of Samson pursuant to special needs.<sup>126</sup>

The Court has continuously held that the chief regulating structure of the Fourth Amendment is the presence of a neutral and detached magistrate, to determine “when the right of privacy must reasonably yield to the right of search.”<sup>127</sup> Searches unreviewed by an impartial

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U.S. 1 (1968). “The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of ‘the Fourth Amendment’s general proscription against unreasonable searches and seizures.’” *Place*, 462 U.S. at 703. The Court must “balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual’s Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.” *Id.* Further, the *Terry* Court required that a frisk for weapons “be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” Brief for the Petitioner at 19, *Samson v. California*, 547 U.S. 843 (2006).

123. While it is generally true that “seizures of property are generally less intrusive than seizures of the person,” when the authorities do not make it absolutely clear how they plan to reunite the suspect and his possessions at some future time and place, seizure of the object is tantamount to seizure of the person. *See Place*, 462 U.S. at 708. “This is because that person must either remain on the scene or else seemingly surrender his effects permanently to the police.” *Id.* at 708 n.8; 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6 (1982 Supp.). Important factors to consider when analyzing the seizure of a person’s property include the length of the detention and the police diligence in quickly pursuing the investigation. *Place*, 462 U.S. at 709.

124. *Place*, 462 U.S. at 698. “[G]iven the enforcement problems associated with the detection of narcotics trafficking and the minimal intrusion that a properly limited detention would entail,” the Fourth Amendment does not prohibit detention of persons or things. *Id.* The key to determining the reasonableness of such detentions is the length of detention and amount of intrusion necessary to accomplish the task. *Id.*

125. *See generally* *United States v. Knights*, 534 U.S. 112 (2001) (allowing searches of probationers with reasonable suspicion); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (declaring warrantless searches of probationers constitutional pursuant to a special need of the state).

126. *Samson v. California*, 547 U.S. 843, 858-59 (2006) (Stevens, J., dissenting). The majority in *Samson* remarks that a special needs analysis was not necessary because their holding was based on general Fourth Amendment principles. *Id.* at n.3 (majority opinion).

127. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 529. *See also* 68 AM. JUR. 2D *Searches and Seizures* § 197 (2006) (“Review of a search warrant application by an impartial magistrate ensures that a neutral and detached evaluation of the situation is interposed between the investigating officers and the private citizen.”). Though parolee searches are different from search warrants, an analogy can be made to the proper role that a magistrate should play in the process. *See also* 79 C.J.S. *Searches* § 182 (2006) (“[T]he Fourth Amendment’s requirement that a warrant

magistrate pose great risks to the foundation of the criminal justice system.<sup>128</sup>

These risks illustrate the need for individualized suspicion and evaluation by a neutral magistrate in order to secure the reasonableness of a search.<sup>129</sup> Never before has the Fourth Amendment requirement of reasonableness been construed to allow such a suspicionless search.<sup>130</sup> The Supreme Court in *Samson* chooses to ignore the historical usage of

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issue from a neutral and detached judicial officer rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. A magistrate must perform his or her neutral and detached function, and not serve merely as a rubber stamp for the police, and must make an independent determination concerning probable cause.”). These analogies from the warrant requirements are particularly relevant given that “if a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Camara*, 387 U.S. at 539. This determination “is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.” *Id.* at 529.

128. *Katz v. United States*, 389 U.S. 347, 356-57 (1967). Searches without warrants are condemnable because officers:

were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.

*Id.* Further, searches conducted without the authorization and oversight of a magistrate bypass “the safeguards provided by an objective predetermination of probable cause,” and substitute “the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.” *Id.* at 358.

129. *See supra* Part II.A -B.

130. *See Samson v. California*, 547 U.S. 843, 847 (2006). The following details are particularly relevant: Samson was walking down the street with a woman and child, Officer Rohleder verified that Samson had no warrants and was in good standing with his parole officer, the drugs were found inside a cigarette box inside Samson’s pocket, Samson was on parole for being a felon in possession of a firearm. *Id.* Also, recall that Samson’s possession of a small amount of methamphetamine would not have been grounds for parole revocation in California. *Id.* at 859 n.1 (Stevens, J., dissenting) (“Presumably, the California Legislature determined that it is unnecessary and perhaps even counterproductive, as a means of furthering the goals of the parole system, to reincarcerate former prisoners for simple possession.”). While California statute allows for “participation in and completion of an appropriate drug treatment program” in lieu of parole revocation for parolees found with illegal substances, the state decided to ignore this call from the legislature and charge Samson with a new offense. Brief for the Petitioner at 35-36, *Samson v. California*, 547 U.S. 843 (2006). *See CAL. PENAL CODE* § 3063.1(a) (West 2006) (“Notwithstanding any other provision of law, and except as provided in subdivision (d), parole may not be suspended or revoked for commission of a nonviolent drug possession offense or for violating any drug-related condition of parole.”). While “searches conducted without reasonable suspicion on the part of searching officers should be considered presumptively violative of the implied term of reasonableness,” searches such as the one in *Samson* provide further details that establish the unreasonableness of the search. Reindl, *supra* note 6, at 169.

the reasonableness requirement and instead rely on the fact that the Fourth Amendment “imposes no irreducible requirement of such [individualized] suspicion.”<sup>131</sup> Noting that the Court has only allowed suspicionless searches in limited circumstances – special needs and programmatic searches – the Court now opines that they have never held that those are the only limited circumstances where suspicionless searches could be reasonable under the Fourth Amendment.<sup>132</sup> The Court thereby purports to create another category of reasonable suspicionless searches – those of parolees – against the weight of precedent.<sup>133</sup>

## 2. The Court Understated Individual Rights and Overstated the State’s Interests in Order to Create a Balance Tipping in Favor of the State

First, the Supreme Court assumed prisoners and parolees to be equal in terms of Fourth Amendment rights.<sup>134</sup> In reality, parolees are

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131. *Samson*, at 2201 n.4 (majority opinion) (implying that because the Fourth Amendment does not specifically require individualized suspicion in its text, individualized suspicion is not always required). The majority assumes that because the Framers did not explicitly write that individualized suspicion is required, it cannot be read into the meaning of the Fourth Amendment, despite historical evidence supporting the assumption that the Framers assumed individualized suspicion to be required. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

132. *Samson*, 547 U.S. at 855 n.4. See *Camara*, 387 U.S. at 537 (“[P]ublic interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results” in reference to the need for programmatic, routine searches.); see *supra* note 29 (detailing the first usage of the term “special needs” and why the exception is necessary).

133. *Samson*, 547 U.S. at 847.

134. “Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy. The conclusion is remarkable not least because we have long embraced its opposite.” *Samson*, 547 U.S. at 861 (Stevens, J., dissenting). “Contrary to the dissent’s contention, nothing in our recognition that parolees are more akin to prisoners than probationers is inconsistent with our precedents. Nor, as the dissent suggests, do we equate parolees with prisoners for the purpose of concluding that parolees, like prisoners, have no Fourth Amendment rights.” *Samson*, 547 U.S. at 850 n.2 (majority opinion). While the majority claims Justice Stevens’s dissenting opinion is off base for contending that the majority equates prisoners with parolees for purposes of the Fourth Amendment, they provide no support for this contention. See *id.* The dissent points to *Hudson* in order to support their position, while the majority ignores the specific holding of *Hudson*, that prisoners have Fourth Amendment rights but their interests must fall to the pressures of internal security and institutional safety within the prison walls. *Id.* Searches are not to be undertaken lightly, as they arouse more than a “petty indignity.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968). “It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.” *Id.* at 17.

more like probationers than they are like prisoners.<sup>135</sup> Even so, *Hudson* explains that limitations on prisoners Fourth Amendment rights occur because of institutional reasons.<sup>136</sup> These concerns simply do not exist for parolees because they have been allowed to leave the institutional setting and return to the community.<sup>137</sup>

Second, the Court never made clear the particular state interests justifying the search, instead remarking that California's grave safety concerns justify California in dealing with its parolees in any manner it deems proper.<sup>138</sup> States in general, not California specifically, have an

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135. See *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Although the Court's recent trend has included a backing away from the idea that probationers and parolees are similar and that searches of both groups require reasonable suspicion, probationers and parolees remain quite similar. Reindl, *supra* note 6, at 134. Like probationers, parolees are set free in the community. *Morrissey*, 408 U.S. at 482. "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime." *Id.* For example, he "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Id.* Life of a parolee is considerably different from confinement in a prison. *Id.* Parolees live a relatively normal life. *Id.* It makes sense to "attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere 'anticipation or hope of freedom.'" *Id.* at 495 n.8. A parolee's liberty "includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* The majority in *Samson* fails to justify why the standard should be different for parolees and probationers, instead relying on unspoken assumptions that parolees commit more crime than probationers and are less able to be trusted. John D. Castiglione, *Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 74 (2007).

136. See *supra* Part II.C.1 and accompanying notes.

137. Parolees are set free in the community subject to certain restrictions; therefore, concerns of the institutional setting cannot apply. See *supra* note 135.

138. *Samson*, 547 U.S. at 853-54. Further, *Samson* "has not shown that the States on whose decisions he relies have a parolee population or supervision problem which is remotely comparable to that of California. Each State must be permitted to address and resolve its social issues in its own fashion, with due regard for the constitutional rights of those affected." Respondent's Brief on the Merits at 19, *Samson v. California*, 547 U.S. 843 (2006). The Supreme Court has determined that California's interest in the "successful management of the parole system to ensure compliance with parole conditions is overwhelming." *Id.* at 13. Recidivism rates pose a serious threat to public safety and California and throughout the states. *Id.* at 14. Public safety is not a compelling governmental interest. If a parolee is such a dangerous criminal, why is he out of prison, living and working in the community? In the years since California's adoption of the suspicionless search of parolees, California's recidivism rate remains one of the highest in the nation. See *Samson*, 547 U.S. at 865 n.6 (Stevens, J., dissenting). Suspicionless searches of parolees have not proven an incentive for parolees to commit fewer parole violations. *Id.* The majority in *Samson* seems to rely on the fact that those who have been convicted of a crime are likely to reoffend, without any comparison of crime rates between parolees and other individuals. Castiglione, *supra* note 135, at 74. It is speculative, at best, that subjecting parolees to suspicionless searches creates a greater sense of respect for the law in parolees rather than producing resentment of the law and society. *Id.* Even accepting this flawed argument, propensity evidence is not typically seen as strong enough to support a curtailment of Constitutional rights. *Id.*

interest in ensuring that parolees obey the law.<sup>139</sup> Nevertheless, general interests in law enforcement do not trump constitutional rights.<sup>140</sup> California may deal with crime control in any manner that does not interfere with constitutional rights.

*B. Both Consent and Special Needs Fail to Validate Blanket Suspicionless Searches of Parolees*

Searches have been validated based on consent of the person being searched in order to bypass an analysis of whether the search would have otherwise been justifiable.<sup>141</sup> Other searches have been deemed valid because a special need beyond law enforcement created a balance in favor of the state.<sup>142</sup> Both of these methods fail to provide adequate justification for suspicionless searches of parolees such as the search in *Samson*.

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139. Respondent's Brief on the Merits at 13, *Samson v. California*, 547 U.S. 843 (2006). The Supreme Court has determined that California's interest in the "successful management of the parole system to ensure compliance with parole conditions is overwhelming." *Id.* Recidivism rates pose a serious threat to public safety in California and throughout the states. *Id.* at 14. Society also has an interest in assuring that all citizens are treated with basic fairness – parolees are no exception. *Morrissey v. Wisconsin*, 408 U.S. 471, 484 (1972). Fair treatment of parolees increases odds of successful rehabilitation because reactions to arbitrary decisions are avoided. *Id.* California's interest in ensuring that parolees obey the law by providing maximum surveillance of their activities has roots in Jeremy Bentham's theory of prison design, aligning cells in a circle around a guard station which inmates cannot see into. *Leading Cases, supra* note 97, at 183-84. The station may or may not be manned at any given time. *Id.* Bentham's "core idea – that supervision, real or imagined, can deter crime and recidivism – continues to have staying power." *Id.*

140. See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding that vehicle checkpoints maintained for the purpose of catching drug traffickers are contrary to the Fourth Amendment); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that a policy of reporting pregnant patients suspected of drug use to the authorities was "ultimately indistinguishable from the general interest in crime control").

141. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Zap v. United States*, 328 U.S. 624 (1946); *United States v. Drayton*, 536 U.S. 194 (2002) ("[P]olice officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding."). Some disagree with the consent rationale, claiming that getting rid of consent searches would "reaffirm a belief that the police can solve crime by focusing not on hunches, but on suspicion and probable cause" and eliminate the possibilities of police targeting citizens, coercing them into consenting, and leaving the consenter feeling "diminished and angry." Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271-72 (2002). "It would mean that the Fourth Amendment's concern for the privacy of each citizen would be restored to its rightful place – to be interfered with only when the government has the proper justification for doing so." *Id.* at 272.

142. See, e.g., *supra* note 29 (listing many examples of special needs cases).

### 1. *Samson* and the Consent Exception

The *Samson* Court purports to allow the California Supreme Court to handle California's consent issues.<sup>143</sup> In *Reyes*, the California Supreme Court held that in California, searches of parolees cannot be validated using the consent rationale.<sup>144</sup> Despite the lack of availability of the consent rationale in California, at the very least, a parolee's acceptance of a search condition prior to parole severely diminishes that parolee's subjective expectation of privacy.<sup>145</sup>

This begs the question of whether there existed valid consent by *Samson*, or anyone similarly situated, for a search of his person at any time without any suspicion. Although *Samson* did sign a document containing his conditions of release, of which the search condition was a part, there can be no valid consent without choice.<sup>146</sup> Traditional notions of consent require a voluntary, intelligent, and knowing waiver of a known right, although the Supreme Court has rejected a strict waiver test for purposes of the Fourth Amendment.<sup>147</sup>

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143. See Respondent's Brief on the Merits at 33-36, *Samson v. California*, 547 U.S. 843 (2006).

144. *People v. Reyes*, 968 P.2d 445, 448 (Cal. 1998) ("[T]he consent exception to the warrant requirement may not be invoked to validate the search of an adult parolee because, under the Determinate Sentencing Act of 1976, parole is not a matter of choice."). But see Respondent's Brief on the Merits at 36-37, *Samson v. California*, 547 U.S. 843 (2006) ("California parolees in general, and petitioner in particular, are given a meaningful choice: conditional liberty with reduced Fourth Amendment protection or continued incarceration with no expectation of privacy.").

145. See *Samson*, 547 U.S. 843; *United States v. Knights*, 534 U.S. 112 (2001).

146. The search condition imposed on *Samson* pursuant to California law, "provides for a 'notice of parole,' which is 'a general description of rules and regulations governing parole.' By statute, '[t]he notice of parole shall read as follows: . . . Search. You and your residence and any property under your control may be searched without a warrant at any time by any agent of the Department of Corrections or any law enforcement officer.'" Brief for the Petitioner at 2, *Samson v. California*, 547 U.S. 843 (2006). "An inmate who does not so agree loses 'worktime credit on a day-for-day basis and shall not be released until he or she either complies with the provision . . . or has no remaining worktime credit, whichever occurs earlier.'" Brief for the Petitioner at 3, *Samson v. California*, 547 U.S. 843 (2006). Essentially, a prisoner will "remain incarcerated until he signs or until he has served his full sentence plus his statutory period of parole." Respondent's Brief on the Merits at 10, *Samson v. California*, 547 U.S. 843 (2006). "The parole authority shall revoke the parole of any prisoner who refuses to take any of several specified actions, including 'sign[ing] a parole agreement setting forth the general and any special conditions applicable to the parole.'" Brief for the Petitioner at 3, *Samson v. California*, 547 U.S. 843 (2006).

147. See *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that a constitutional right may not be waived unless there is "an intentional relinquishment or abandonment of a known right or privilege"). The waiver standard can be divided into three parts.

First, the person must in fact have relinquished or abandoned the constitutional right in question. Second, the relinquishment must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' Third, the holder of the right must be aware of the nature of the right and of the primary

An attempted justification of suspicionless searches of parolees based on consent is futile at best. First, California has held that parolees do not consent to parole.<sup>148</sup> While other states may not agree, the Supreme Court has declined to make this decision for them.<sup>149</sup> Second, states retain huge obstacles to overcome in proving voluntary, intelligent, and knowing waivers of Fourth Amendment rights.<sup>150</sup> Finally, the consent rationale leads to unanswered questions about the coercive means that could be used to obtain consent and the effect of consent on the rights of third parties.<sup>151</sup>

## 2. *Samson* as a Special Needs Case

Federal precedent requires use of the special needs test.<sup>152</sup> As such,

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consequences of its relinquishment.

DRESSLER, *supra* note 5, at 62. It is possible for a criminal defendant to waive a constitutional protection, provided that waiver is made knowingly and voluntarily. Respondent's Brief on the Merits at 34, *Samson v. California*, 547 U.S. 843 (2006) (explaining that a defendant "may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution"). An "individual's consent to search may be deemed voluntary, for Fourth Amendment purposes, even if it is motivated by the subject's belief that refusal to consent will result in concrete disadvantages." *Id.* See also *Zap v. United States*, 328 U.S. 624 (1946) (holding that an individual can give valid and binding consent to a search that will be performed at unspecified times in the future). However, courts are required "to indulge every reasonable presumption against waiver" of Fourth Amendment rights. DRESSLER, *supra* note 5, at 63. In Fourth Amendment cases, courts often apply a less strict standard of waiver, as the Fourth Amendment does not provide trial rights, but instead protects the right of persons to be left alone. *Schneekloth v. Bustamonte*, 412 U.S. 218, 241 (1973) (finding a "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment"). In *Schneekloth*, the Court addressed the question of what the prosecution must show to prove that consent was given voluntarily. *Id.* The court determined that voluntariness is a "question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent." *Id.* at 223.

148. *Reyes*, 968 P.2d at 448; see also *supra* note 144.

149. See *supra* note 144 and accompanying text.

150. See *supra* notes 146 and 147 and accompanying text.

151. For example, are there any limits on things to which someone may consent? See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968) (holding that a search cannot be justified based on consent when the consent was given because an officer claimed to have a warrant). Can the consent rationale extend to forcing automobile search conditions on one who wishes to obtain a driver's license? How will third parties' privacy rights be protected during consent searches? See *infra* note 169 (discussing *Samson's* impact on third parties). If police may hold prison over a person's head to urge them to consent to a search condition, what else would be a permissible form of coercion? For example, would it be permissible to coerce certain groups into taking medications, such as those for sex offenders which reduce testosterone levels?

152. Support for use of the special needs test to determine if a warrantless search is permissible comes from Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.* 469 U.S. 325 (1985) (Blackmun, J., concurring); see also *supra* note 30. "Although the most recent United States Supreme Court decision in *Samson* strongly suggests that the balancing test, which is an easier test

the special needs exception does not apply to suspicionless searches of parolees because the searches are conducted for law enforcement purposes,<sup>153</sup> they are conducted by police officers,<sup>154</sup> and parolees already have a lowered expectation of privacy by virtue of their status.<sup>155</sup>

Once it is determined that the state has a special need, that need must be balanced against the parolee's Fourth Amendment interests to determine if the search is reasonable.<sup>156</sup> In *Samson*, the Supreme Court struggled to conduct a balancing analysis, remarking that California has grave safety concerns and parolees have no Fourth Amendment rights

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for the State to satisfy, should apply to a *Fourth Amendment* analysis," New Jersey courts have decided to assess future searches "within the framework of the special-needs test." *State v. O'Hagen*, 914 A.2d 267, 158 (N.J. 2007) (emphasis added). "The more stringent special needs analysis provides an appropriate framework for evaluating defendant's New Jersey state constitutional claims." *Id.* One may infer from the fact that the Supreme Court declined to use the special needs test that the Court recognized that special needs is a "tough sell" in this case. Castiglione, *supra* note 135, at 79-81 ("The fact that the majority eschews the special needs analysis indicates that the majority knew that a compelling 'special needs' case possibly could not, in fact, have been made.").

153. The special needs exception applied only to states' needs that go beyond a general interest in law enforcement. RINGEL, *supra* note 29.

154. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding a warrantless search by a probation officer permissible pursuant to a special need). Probation officers are more concerned with rehabilitating, overseeing, and helping offenders to successfully reintegrate into society, not with law enforcement. 67A C.J.S. *Pardon & Parole* § 62 (2007). Yet, many states use police officers to conduct checks on parolees instead of probation officers merely because those states "do not have the resources to assign the enforcement of a particular scheme to a specialized agency." Respondent's Brief on the Merits at 28, *Samson v. California*, 547 U.S. 843 (2006). Some argue that "so long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself." *Id.* Others find the reintegration goal permanently at odds with the law enforcement goal, such that police officers can never conduct the same type of supervisory searches as parole or probation officers. See 67A C.J.S. *Pardon & Parole* § 62 (2007).

155. See *Samson*, 547 U.S. at 858 (Stevens, J., dissenting). The need of the state to search parolees is not conceptually different from a general interest in law enforcement and crime control. *But see* Respondent's Brief on the Merits at 5, *Samson v. California*, 547 U.S. 843 (2006) (claiming that the Supreme Court's past cases have "validated the supervision of probationers and parolees as a 'special need' that can justify a suspicionless search" so long as the primary purpose of the search "is not to detect evidence of criminal wrongdoing for use in a criminal prosecution"). "A state's operation of a probation system 'presents special needs beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements'" in order to give officers "the tools they need to adequately supervise parolees." *Id.* at 22.

156. "Even if 'special needs' analysis did apply, the Court's 'special needs' cases have 'employed a balancing test that weighed the intrusion on the individual's interest in privacy against the 'special needs' that supported the program.'" Brief for the Petitioner at 39 n.18, *Samson v. California*, 547 U.S. 843 (2006). "The benefit to the State of allowing police to conduct suspicionless parolee searches does not outweigh the substantial intrusion on privacy." *Id.* See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (balancing the state's interest in controlling the flow of illegal aliens against a motorist's right to free uninterrupted passage).

and, thus, the balance falls in favor of the state.<sup>157</sup> The outcome of the balancing test is not this clear-cut. Parolees retain a somewhat diminished expectation of privacy, but that cannot be inferred to mean they have lost all Fourth Amendment rights.<sup>158</sup>

It is doubtful that the Court would have been able to justify suspicionless searches of parolees based on special needs.<sup>159</sup> Should the Court have affirmed the decision of the Court of Appeals in *Samson* based on special needs, the Court would have ventured into unprecedented territory by coupling California's need to combat grave safety concerns with the proposition that the searches are conducted for a reason other than a general interest in crime control.<sup>160</sup> While this

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157. See *supra* Part III.C.1 and accompanying notes (detailing the Supreme Court's reasoning in *Samson*) and *infra* Part IV.A.2 (outlining the proper balancing test the Court should have applied).

158. See *Samson*, 547 U.S. at 858 (Stevens, J., dissenting); see also *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1996) (balancing the interests of sex offenders against the state's interest).

A state statute requiring inmates convicted of offense[s] involving sexual assault to provide the state with DNA samples before their release on parole does not violate the Fourth Amendment protection against unreasonable searches and seizures; while obtaining and analyzing the DNA or saliva of an inmate convicted of a sex offense is [a] search and seizure implicating Fourth Amendment concerns, it is a reasonable search and seizure in light of the inmate's diminished privacy rights, the minimal intrusion of saliva and blood tests, and the legitimate government interest in the investigation and prosecution of unsolved and future criminal acts by the use of DNA in a manner not significantly different from the use of fingerprints.

59 AM. JUR. 2D *Pardon and Parole* § 126 (2007).

159. See *Ferguson v. City of Charleston*, 532 U.S. 67, 88 (2001) (Kennedy, J., concurring).

None of our special needs precedents has sanctioned the routine inclusion of law enforcement, both in the design of the policy and in using arrests, either threatened or real, to implement the system designed for the special needs objectives. The special needs cases we have decided do not sustain the active use of law enforcement, including arrest and prosecutions, as an integral part of a program which seeks to achieve legitimate, civil objectives. The traditional warrant and probable-cause requirements are waived in our previous cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes.

*Id.* Since the Supreme Court's ruling in *Samson*, other courts' decisions have presumptively analyzed the Court's refusal to use the special needs test in favor of the balancing test, finding that the Court may have boxed themselves into a situation requiring expansion of the reasonableness requirement. See, e.g., *United States v. Weikert*, 504 F.3d 1 (1st Cir. 2007) ("The Court's application, in *Samson*, of the totality of the circumstances analysis also may reflect its recognition that the search in that case could not qualify as a 'special needs' search. . . . [T]he search in *Samson* – that of a suspected parole violator's person by a law enforcement officer . . . is difficult to characterize as anything other than an ordinary law enforcement search for weapons or contraband.").

160. See *supra* Part III.C.1 (providing the majority's expression of California's interest in conducting suspicionless searches of parolees to combat California's grave safety concerns in a way that works best for California); see *supra* Part II.B.3 (explaining that the special needs exception requires the state to have an interest separate from the general interest in combating crime). Before the *Samson* decision, *United States v. Knights* provided the controlling precedent that parolee

proposition may seem plausible on its face, it is undercut by the California legislature's choice not to revoke parole for a charge of possession.<sup>161</sup> A special needs analysis results in several possible ramifications and shaky precedent for future courts to follow.<sup>162</sup>

### C. Ramifications of the Supreme Court's Decision

The *Samson* Court disregards potential problems arising from its decision. First, the Court assumes that California's prohibition on arbitrary, capricious, and harassing searches is a valid check on police officers' discretion.<sup>163</sup> In reality, no California court has ever

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searches require reasonable suspicion. *See supra* Part II.C.2 (detailing the Supreme Court's decision in *Knights*).

161. *Samson v. California*, 547 U.S. 843, 859 n.1 (2006) (Stevens, J., dissenting). If California has a special need requiring suspicionless searches to ensure that parolees do not recommit crimes, this need would be served by revoking the parole of those who are found in violation. As the California Legislature determined, it is counterproductive for California's penal system to reincarcerate former prisoners for possession. *Id.*; *see also supra* note 130. California's need to combat "safety concerns" appears, in practice, to be an interest in crime control, and therefore, not a special need. While California should have the right to deal with crime control however it chooses, California has already chosen to deal with parolee drug possession without revoking parole. The constitutionality of California's scheme should be judged based on the safeguards as they currently exist, not pursuant to an unbounded panorama of options which may or may not be plausible. *But see* *Alabama v. Shelton*, 535 U.S. 654, 678 n.2 (2002) (Scalia, J. dissenting) (criticizing the Supreme Court's choice to mandate procedures to the state that effectively "forc[e] the State to employ one 'functional equivalent' rather than the other").

162. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding that a hospital policy requiring pregnant women to submit to drug testing was not valid because its primary purpose was law enforcement). Special needs could be extended using the *Samson* Court's reasoning to cover several situations in which the Court has previously held that the interests were not separate from general interests in crime control. *Samson* creates confusing precedent for courts to follow as some courts favor limiting *Samson* to parolee searches while other courts favor extending the principles of *Samson* to many different types of searches. *Compare* *United States v. Amerson*, 483 F.3d 73, 79 (2d Cir. 2007) (finding that "nothing in *Samson* suggests that a general balancing test should replace special needs as the primary mode of analysis of suspicionless searches outside the context of the highly diminished expectation of privacy presented in *Samson*" when holding that the reasoning of *Samson* does not necessarily apply to probationers), and *New Jersey v. O'Hagen*, 914 A.2d 267, 277 (N.J. 2007) ("Although the most recent United States Supreme Court decision in *Samson* strongly suggests that the balancing test, which is an easier test for the State to satisfy, should apply to a Fourth Amendment analysis, we continue to adhere to our statement . . . that future drug and alcohol testing programs will be assessed 'within the framework of the special-needs test.' The more stringent special needs analysis provides an appropriate framework for evaluating defendant's New Jersey state constitutional claims.") with *United States v. Lopez*, 474 F.3d 1208, 1213 (9th Cir. 2007) ("If under the California parole-search statute, a parolee has no expectation of privacy in his person, we reason that a parolee has no legitimate expectation of privacy in his residence either, at least when the parolee is present.").

163. *Samson*, 547 U.S. at 856 (Stevens, J., dissenting). "Nothing about Petitioner's conduct gave rise to any suspicion that he was engaged in wrongdoing." Brief for the Petitioner at 5, *Samson v. California*, 547 U.S. 843 (2006). Rohleder testified "that he searches parolees on a

invalidated a search because it was arbitrary, capricious, or harassing.<sup>164</sup> In effect, this safeguard does not provide adequate protection for parolees.<sup>165</sup>

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‘regular basis,’ but ‘I don’t go after everybody all the time.’” *Id.* Rohleder further elaborated that he needs to make sure parolees are obeying the law because it is a privilege for them to be out of prison. *Id.* Requiring police officers to “articulate reasons for the search is a deterrent to impulsive or arbitrary governmental conduct,” which is the purpose of the Fourth Amendment. Reindl, *supra* note 6, at 163.

Furthermore, the Court rejected the idea that the Fourth Amendment mandates particularized suspicion as a limit on police powers, pointing to the special-needs doctrine as an example of an accepted justification for suspicionless searches. Yet the Court declined to use special needs as its underlying rationale. Rather, the Court emphasized throughout its opinion that the determination of the search’s reasonableness came from balancing Samson’s privacy expectations against state interests. The Court observed the California’s backstop to seemingly broad and nonindividualized discretion is the state’s “arbitrary, capricious, or harassing” standard. The Court did not consider whether the Samson search itself had been arbitrary, capricious, or harassing, and did not suggest other guidelines that the state might employ.

*Leading Cases, supra* note 97, at 186.

164. *Leading Cases, supra* note 97, at 188. The prohibition on arbitrary, capricious, and harassing searches is quite difficult to break – the standard is impossible to violate as long as the searching officer is aware that he is searching a parolee. *Id.* at 189. The standard is also hard to implement because it requires courts and judges to determine whether an officer has personal animosity toward a person. *Id.* “Fourth Amendment inquiries typically do not examine the subjective motivations of police officers but instead examine the objective reasonableness of the officers’ actions.” *Id.* “California’s standard, in short, requires courts to assess the constitutionality of parolee searches using an analytical tool disfavored by the courts themselves.” *Id.* at 190. *See, e.g.,* Transcript of Oral Arguments at 45, *Samson v. California*, 547 U.S. 843 (2006) (documenting that upon questioning the state on whether a parolee getting stopped on every street corner by a different cop would violate the standard, the state remarked, however unlikely this would be to happen, if it did, it would not constitute an arbitrary, capricious, or harassing search). Thus “California’s policy could facilitate unintentional harassment of parolees.” *Leading Cases, supra* note 97, at 191. There is an inherent contradiction in allowing law enforcement officials the discretion to conduct suspicionless searches while at the same time prohibiting offenders from questioning the subjective motivations of the searching officer. Reindl, *supra* note 6, at 165-66. *See, e.g.,* *United States v. Barnett*, 415 F.3d 690 (7th Cir. 2005) (hypothesizing that even searching a probationer’s home every five minutes might not be unreasonable). When comparing frequent searches to the alternative of prison, prison is more invasive on an individual’s Fourth Amendment rights. Reindl, *supra* note 6, at 161. Therefore, any punishment that is less restrictive than prison could be deemed reasonable. *Id.* But consider whether a short prison sentence or a lengthy period of probation is more prohibitive of Fourth Amendment rights. *Id.* at 162.

165. *See, e.g.,* *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 533 (1967) (“[B]road statutory safeguards are no substitute for individualized review.”). California’s scheme of granting unbridled discretion to police officers to search at will “resembles the general warrants and writs of assistance that gave rise to the Fourth Amendment.” Brief for the Petitioner at 18, *Samson v. California*, 547 U.S. 843 (2006). Even though the prohibitions do not adequately protect parolees, they raise serious concerns about “the status of parolees, the appropriate level of state surveillance, and the right way to implement similar schemes elsewhere.” *Leading Cases, supra* note 97, at 184. The Court has divided the population into segments, chosen one segment, deprived members of that segment of their Fourth Amendment rights, and justified their decision based on the fact that they only chose one segment. *See Zant v. Stephens*, 462 U.S. 862, 911 (1983) (Marshall, J., dissenting)

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(“But merely circumscribing the category of cases eligible for the death penalty cannot remove from constitutional scrutiny the procedure by which those actually sentenced to death are selected.”). “As a matter of policy the Court should have more narrowly tailored the guidelines for state law enforcement to provide more direction to the states and to minimize Fourth Amendment violations that may result from this kind of search.” *Id.* This is especially true considering the Court has previously held grants of unfettered discretion unconstitutional. *See Florida v. Wells*, 495 U.S. 1 (1990). “Although seemingly nothing more than an afterthought, this observation allowed the Court to sidestep the larger issues of parolee status and privacy rights by handing over essentially all oversight responsibilities for suspicionless parolee searches to the state.” *Leading Cases, supra* note 97, at 187. “Close examination of California’s standard reveals definitional, constitutional, and practical shortcomings that make it an ineffective restraint on the search powers California grants to its police officers.” *Id.* at 187-88.

Legal definitions of the “arbitrary, capricious, or harassing” standard in California’s courts are broad and somewhat circular. Courts describe “arbitrary” behavior as having no legitimate purpose, sometimes pairing “arbitrary” with “oppressive”, courts refer to “harassing” conduct as that “undertaken for purposes of harassment” including “unrestricted searching . . . at the whim and caprice” of police officers. The term “capricious” doesn’t generally merit its own definition in these cases; when it does show up, it usually appears as part of the definitions of “arbitrary” and “harassing”.

*Id.* at 188. Violations of the arbitrary, capricious, or harassing standard are determined by assessing three things: first, whether the officer had a permissible law enforcement purpose for the search; second, whether the police officer conducted the search in a manner that was reasonable; finally, whether the officer was motivated to conduct the search for reasons other than personal animosity. *Id.* If the state satisfies these three criteria, the court will typically defer to the judgment of the officer in the field on whether the search was reasonable. *Id.* An officer who “decides on a whim to stop the next red car he or she sees” without a legitimate law enforcement purpose, or one who searches the same parolee too frequently, at unreasonable hours of the day or night, or for an unreasonable duration, violates the standard prohibiting arbitrary, capricious, and harassing searches. *Id.* But, the “legitimate law enforcement purpose need not be specific or individualized.” *Id.* at 189. The *Samson* Court chose not to enact other safeguards that the Supreme Court has relied upon in the past, indeed, the Supreme Court did not even express concern that the prohibition on arbitrary, capricious, and harassing searches may not be enough. *See, e.g., United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring) (explaining that the Court cannot know what the practical consequences of an action will be until the procedure has been in effect and “tested in the real world of state and federal law enforcement”). Blackmun continues:

[T]his Court will attend to the results. If it should emerge from experience that, contrary to our expectations, . . . [the action] results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.

The logic of a decision that rests on untested predictions about police conduct demands no less.

*Id.* *See also Payne v. Tennessee*, 501 U.S. 808, 837 (1991) (Scalia, J., concurring) (“[W]ith the command of due process before us, this Court and the other courts of the state and federal systems will perform the ‘duty to search for constitutional error with painstaking care,’ an obligation ‘never more exacting than it is in a capital case.’”). It seems as though it might be impossible for a parolee to bring a successful claim based on a violation of the arbitrary, capricious, or harassing standard given that the only actual criteria for determining the reasonableness of a search is whether the officer has knowledge that the individual is a parolee. Castiglione, *supra* note 135, at 77. To this end, “Courts must conduct an ‘objective assessment’ of the ‘facts and circumstances’ known to the searching officer at the time the search is conducted” to determine if “factors that will ‘warrant a man of reasonable caution in the belief’ that one is on parole. James M. Binnall, *Released From Prison . . . But Placed In Solitary Confinement: A Parolee Reveals the Practical Ramifications of Samson v. California*, 34 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 65, 69-70 (2008).

Further, the Court fails to analyze potentially outrageous consequences for parolees and third parties if parolee searches are left unconstrained.<sup>166</sup> First, a system of suspicionless searches is a disservice to parolees because these types of searches foster resentment of the justice system in parolees.<sup>167</sup> Parolees are also at considerable risk of suffering from overly intrusive searches for no reason.<sup>168</sup> Also,

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166. See *Leading Cases*, *supra* note 97, at 183. Other states will most likely follow California in permitting suspicionless searches of parolees. As such, the Court should have more seriously considered the ramification of its decision and taken its role in creating reasonableness standards for lower courts to rely on more seriously. *Id.* at 191. “The *Samson* Court’s failure to provide additional guidance for suspicionless searches of parolees strongly suggests that the Court does not hold in high regard the status and privacy rights of parolees.” *Id.* at 192. *But see* *United States v. Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) (holding that *Samson* only applies “when authorized under state law,” so that a search could not be justified under special needs because it was conducted by police officers when state law only allowed searches to be conducted by Special Enforcement Officers); *Rollins v. Florida*, 948 So. 2d 1046 (Fla. 2007) (finding that as no statute in Florida permitted suspicionless searches, the *Samson* ruling did not apply).

167. Brief for the Petitioner at 8-9, *Samson v. California*, 547 U.S. 843 (2006). Overall, the standards formulated by the Court in *Samson* create bad policy for helping to assimilate released prisoners into normal society. *Leading Cases*, *supra* note 97, at 192.

Suspicionless searches are likely to undermine the State’s interest in reintegrating parolees into society. Subjecting parolees to unrestricted searches that may inflict great indignity and arouse strong resentment, in the absence of even minimal suspicion of wrongdoing, is not likely to promote reintegration of the parolee into society at large.

Brief for the Petitioner at 8-9, *Samson v. California*, 547 U.S. 843 (2006). Another potential detrimental effect of subjecting parolees to suspicionless searches is the impact these searches will have on their psyche. Reindl, *supra* note 6, at 163-65. A person who is constantly distrusted by law enforcement officials, even when engaging in everyday activity, may be more likely to respond by becoming distrustful. *Id.* One parolee explains the resentment and isolation of the *Samson* rule:

For these reasons, when they first released me, I did not interact with those I did not know. I shut out many who could have helped me navigate in a world I was not a part of for over four years. For fear of being embarrassed, labeled, or harassed, I did not share my story with anyone and many avoided me. Unfortunately, I am the representative of a culture that already views trust as a weakness and engages readjustment demons in a solitary battle. Therefore, in addition to the practical separation that an incident with law enforcement fosters by physically driving many away from parolees, we must also deal with the harbored intrinsic distrust amplified by the *Samson* decision that is often more damaging. . . . I struggled with the concept of ‘normal’ for months after my release. Inside, I had a place in the hierarchy of a vicious criminal element. In the free world, I was an ex-convict initially trying to use the tools I employed in prison to construct a life on the outside. I was unsuccessful. I could not communicate with those who could help me because all meaningful dialogue triggered a sense of paranoia that haunted my early days on the street.

Binnall, *supra* note 165, at 74, 76.

168. Brief for the Petitioner at 19-20, *Samson v. California*, 547 U.S. 843 (2006). For example, intrusive searches “such as strip searches and body cavity searches, are reasonable so long as performed on a parolee, whether or not the particular parolee being searched is likely to be concealing drugs or other contraband on her body.” *Id.* Both probation and parole were designed as less restrictive placements than prison. Reindl, *supra* note 6, at 165.

Given the fact that most people satisfy their probationary supervision without incident,

third parties can be harmed by random searches of parolees.<sup>169</sup> This third party concern was validated in *People v. Woods*<sup>170</sup> when officers searched a probationer's home in order to gain evidence about a third party also living in the house.<sup>171</sup> In *Woods*, the California Supreme Court allowed admission of the evidence despite the purpose of the search.<sup>172</sup> Finally, suspicionless searches of parolees defeat the Court's interest in judicial efficiency,<sup>173</sup> create new concerns for sentencing,<sup>174</sup> and present unlimited questions about the future of parolee searches.<sup>175</sup>

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and fully re-enter society afterwards, it is worth considering whether requiring all probationers to subject themselves to otherwise unreasonable, warrantless searches of their persons, homes, and automobiles is actually promoting lawful behavior or antagonizing the very individuals we are supposed to rehabilitate.

*Id.* This logic applied to the parolee as well.

169. Brief for the Petitioner at 9, *Samson v. California*, 547 U.S. 843 (2006) (explaining that suspicionless searches of parolees will affect "third parties who share a home with parolees, [which] may prevent parolees from finding suitable housing and forming close relationships"). "If increased numbers of probationers were not welcome in homes with supportive environments, higher recidivism rates and a corresponding decrease in public safety may be expected, both of which would detract from the optimum successful functioning of the probation system." Brief for the Petitioner at 24, *Samson v. California*, 547 U.S. 843 (2006). The state contends that the Fourth Amendment "simply was not intended to address the social concerns petitioner wishes to raise." Respondent's Brief on the Merits at 16, *Samson v. California*, 547 U.S. 843 (2006). There are also concerns for those who travel with parolees. Filler, *supra* note 4. A parolee who is searched and discovered to possess some form of contraband may give the police reasonable suspicion to search all persons riding in the same car or walking with the parolee. *Id.*; see *supra* note 58 (noting that *Samson's* walking companion, who was not on parole, was searched as a result of the parole stop). "This snowball process could take on troubling racial skew, since 64% of all state inmates are minorities. To the degree that minority offenders socialize predominately with other minorities . . . it will be minorities most at risk due to proximity to parolees." Filler, *supra* note 4. *But see* *Commonwealth v. Scott*, 916 A.2d 695 (Pa. Super. Ct. 2007) (holding that persons with a probationer cannot be searched merely because they are associated with the probationer, as this does not equate to reasonable suspicion). At least three different categories of persons could be harmed by the Court's decision in *Samson*: those who ride in cars with parolees, those who live with parolees, and those who associate with parolees in public. See, e.g., Binnall, *supra* note 165, at 71-74.

170. 981 P.2d 1019 (Cal. 1999).

171. *Id.*

172. *Id.*

173. Reindl, *supra* note 6, at 167. "If what is desired by a new probation search and seizure rule is judicial efficiency, eliminating the precedential value of an immense collection of criminal case law, which courts have been refining for decades, is hardly an efficient use of legal resources." *Id.*

174. See Filler, *supra* note 4. After *Samson*, prosecutors have new incentives to seek parole over probation. *Id.* For example, for an offender with nine months time served, the prosecutor will be more likely to ask for an indeterminate sentence of nine months to five years than time served plus five years of probation. *Id.* Conversely, the increased supervision of parolees may make those deciding whom to parole more apt to place inmates back on the street earlier in their sentences. *Id.*

175. *Id.* Take for instance, the very real possibility of electronic monitoring of parolees. *Id.* The government could attain remarkable levels of supervision in a system where "any parolee can

The decision in *Samson* has already been extended farther than justified by the Supreme Court's reasoning. In *United States v. Lopez*, the Court of Appeals found that since *Samson* held that a parolee has no expectation of privacy in his person, it is only logical that officers may also conduct suspicionless searches of the parolee's residence.<sup>176</sup> This is particularly alarming because of the enormous level of protection the home has traditionally been given in Fourth Amendment cases.<sup>177</sup> While the *Samson* decision may appear limited in scope, the implications raise serious concerns about Fourth Amendment protections.

## V. CONCLUSION

The *Samson* Court strayed from precedent in order to reach a ruling that effectively strips parolees of the little protection they had under the Fourth Amendment.<sup>178</sup> It is imperative that constitutional rights are maintained to protect all citizens, even in the face of momentary emergencies.<sup>179</sup> The Court's chosen method to arrive at its decision was improper – the Framers never intended warrantless searches to be reasonable for purposes of the Fourth Amendment.<sup>180</sup> Further, the Court should have taken a more serious look at the ramifications of its decision for parolees and for ordinary citizens before making such an unprecedented decision.<sup>181</sup>

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be located, and searched, at anytime." *Id.* The decrease in crime from such a system could be thought to justify the infringement on Fourth Amendment rights. *Id.* In the future, the Court is likely to face diverse issues related to the Fourth Amendment, including the advancement of suspicionless searches for those using public transportation, new and more advanced internet surveillance techniques, and new and advanced uses for public surveillance cameras. Castiglione, *supra* note 135, at 112-13.

176. *United States v. Lopez*, 474 F.3d 1208, 1213 (9th Cir. 2007). The *Lopez* Court concluded that the parolee's residence was not significantly different from the parolee's person given the Supreme Court's reasoning in *Samson*. *Id.*

177. *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (finding that the Fourth Amendment "draws a firm line at the entrance to the house"); *Payton v. New York*, 445 U.S. 573, 586 (1980) (finding that searches of a home without a warrant are per se unreasonable as a "basic principle of Fourth Amendment law").

178. *See supra* notes 43-47 and accompanying text (discussing the reasonable suspicion standard developed in *Knights* that applied to parolees prior to the Court's decision in *Samson*).

179. *See supra* note 30.

180. *See supra* Part II.A, and accompanying notes (explaining the lack of warrantless searches during the time the Constitution was written and subsequent modern trend of creating exceptions to the warrant requirement).

181. *See supra* Part IV.C, and accompanying notes (detailing several possible ramifications of the Supreme Court's decision in *Samson*).